G. M. Vairo, *Happy (?) Birthday Rule 11: Foreword*, 37 Loyola L.A. Law R. 537 (2004) 19, 20, 27

28 U.S.C.A. Rule 1 to 11, 2005 Supp. 27

PETITION FOR WRIT OF *CERTIORARI*

COMES NOW the Petitioner LEVI ("Lee") BREEDLOVE and requests this Court to grant his Petition For Writ of *Certiorari* because the Eleventh Circuit has departed from Supreme Court precedent and disagreed with other circuits in numerous applications of Rule 11(c)(1)(B) &11(c)(2), Fed.R.Civ.P., with the result that he is under order to pay $79,036.58 in Respondent's attorneys' fees and to comply with ruinous nonmonetary sanctions, and uniformity is needed among the circuits.

OPINIONS BELOW AND JURISDICTION

The Eleventh Circuit entered three opinions in three related cases. The first two decisions were issued on December 16, 2003 (29a; 38a),[1] and are listed in 90 Fed.Appx. 383 (table). The third decision was handed down May 10, 2005 (1a), and is reported at 133 Fed.Appx. 607. The court denied Petitioner's timely petition for rehearing and rehearing *en banc* as to the May 10, 2005 opinion on July 12, 2005 (134a). This Petition for Writ of *Certiorari* is filed on October 10, 2005, within 90 days of the denial of the rehearing petition. It is therefore timely, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (issues raised on first appeal may be raised in petition for *certiorari* after second appeal) ("Most importantly, law of the case cannot bind this Court in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review [cit. om.] Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review.").

CONST'L PROVISIONS AND RULE INVOLVED

This case concerns Rule 11(c)(1)(B) & 11(c)(2), Fed.R.Civ.P. (136a); Art. III supervisory power over lower federal courts (*Frazier v. Heebe*, 482 U.S. 641, 645 (1987)), and the Fifth Amendment: "nor be deprived of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Statement of Facts

Queen Starks, an African-American (104a) with a law degree, was employed by Respondent law firm in 1999. Her supervisors included Ms. Alper and Ms. Hammond. Ms. Starks believed that she was discriminated against on account of race and gender and was physically injured on firm premises. Accordingly, she placed a claim for workers' compensation, lodged an EEOC complaint, and eventually filed two lawsuits against Respondent law firm and her supervisors.

Course of Proceedings

Ms. Starks's first lawsuit was filed in the Fulton County, Georgia State Court on May 16, 2001, and the defendants removed the action to the District Court for the Northern District of Georgia on June 1, 2001, under 28 U.S.C. § 1441 for an allegation of a federal question under 28 U.S.C. § 1331 where it was assigned Civil Action No. 1:01-cv-1441-MHS (Senior Judge Shoob).

Two weeks after removal, June 14, 2001, Ms. Starks filed a lawsuit in the same district court against Respondent law firm seeking damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, for racial and sexual discrimination in employment founding jurisdiction on 28 U.S.C. § 1331 where it was assigned Civil Action No. 1:01-cv-1749-MHS. By order of January 15, 2002, Judge Shoob consolidated the two cases in his court in the course of denying a motion to remand.

Petitioner, a newly practicing civil rights attorney, filed entries of appearance for Ms. Starks on October 3, 2001, in the removed suit and on March 15, 2002, in the Title VII suit.

Post-Discovery Proceedings. Discovery ended on May 21, 2002, and on that day, Petitioner, also African-American, discovered in his law partner's workers' compensation file a many-times photocopied letter dated January 22, 2001, from Elaine Swanson, an employee of Respondent law firm, to one Dr. Orr, a physician treating Ms. Starks in connection with injuries sustained on law firm premises ("the Swanson letter").

The Swanson letter refers to conversations, but there is no negation in the record that the conversations took place; only that the letter is authentic. This absence was critical to Petitioner's entire course of action that eventually led to exceedingly harsh sanctions against him personally. Naturally the letter does not show a copy being sent to Ms. Starks, but Petitioner questioned her about its authenticity (Transcript, January 9, 2003 hearing before Magistrate Judge Linda T. Walker at ___ ("T" at ___"). He learned that the workers' compensation file had been in the hands of Ms. Starks's three previous workers' compensation attorneys, Steven E. Marcus, Joseph W. Seagraves, and William N. Robbins (disbarred, *In re Robbins*, 575 S.E.2d 501 (Ga. 2003)); and Petitioner asked Mr. Robbins whether he had a better copy of the letter (negative).

The next day, May 22, 2002, Petitioner advised Martha C. Perrin, attorney for Respondent law firm, of the letter and a present intention to use it in the litigation. Eight days later, May 30, 2002, Ms. Perrin asserted it was "forged"; but she did not submit an affidavit of Swanson denying her signature or authorship. Breedlove believed that the absence of a sworn denial from Swanson was evidence that Swanson had signed it, or that she could not remember whether she had signed it, or had authorized a subordinate employee to author or to sign it.

In the May 30 letter Ms. Perrin promised to Petitioner that she would investigate the authenticity of the Swanson letter and report to Petitioner the result.

Petitioner relied upon this promise since Ms. Perrin was a partner in a prominent Atlanta law firm and was known generally in the Atlanta legal community to be suffering from terminal cancer.

Unknown to Petitioner until he received in 2003 Respondent law firm's time records,[2] on May 24, 2002, an employee of Ms. Perrin's law firm had drafted some kind of affidavit for Ms. Swanson pertaining to the letter, but Ms. Perrin did not furnish this affidavit to Petitioner or to the court.

On this state of affairs, utilizing his best judgment for and resolving all doubts in favor of his client, on June 28, 2002, Petitioner filed -- on behalf of Ms. Starks --a motion to amend the complaint and supported the motion with the Swanson letter. Respondent's reply did not include any evidence of forgery, only allegation.

Summary Judgment Proceedings. Respondent law firm filed a motion for summary judgment on July 19, 2002 (T at 2(18)). Anticipating the motion, Petitioner had addressed additional letters to Ms. Perrin imploring her to fulfill her promise and furnish to him the results of her investigation into the Swanson letter. His legal research led him to conclude that he had no right under law to compel her to furnish the results,[3] but he wanted to review the results before submitting the Swanson letter as part of Ms. Starks's response to the summary judgment motion. To this end Petitioner obtained two extensions of time to respond to the motion.

Finally, on September 3, 2002, not having received any documents from Ms. Perrin to substantiate her unsupported defense of forgery, and up against a deadline, Petitioner discounted her rhetoric and filed his response to the summary judgment motion referencing

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[2] Invoice, June 7, 2002, p.5, from Perrin's law firm Ogletree, Deakins, Nash, Smoat & Stewart, P.C. to Respondent law firm.

[3] MR BREEDLOVE: *** My thought was discovery is closed *** I did not ask for nor compel because I didn't know whether I could actually compel her to do that subsequent to discovery." (T at 29(9-13)).

the Swanson letter as "document 12" with a caveat to the district court that Respondent law firm claimed the Swanson letter to be forged.[4] Thereafter, under Local Rule 56.1(A), N.D.Ga., Petitioner had no right to file further opposition to summary judgment.

On September 16, 2002, Ms. Perrin "sandbagged" Petitioner with "Defendant's Request for a Hearing before the Court to Discuss Highly Confidential and Serious Issues of Inappropriate Conduct by the Plaintiff and Defendant's Motion to Strike" (T at 2(13-16)), attaching an August 2002 affidavit of a purported handwriting expert who employed flawed methodology.[5] This person opined that the Swanson letter was a forgery. Ms. Perrin's motion was based only on Rule 56(g), Fed.R.Civ.P., and requested a hearing. Respondent law firm also filed "Motion to Strike [Starks's] Statement of Undisputed Material Facts" (T at 2(22-23)) because it relied on Ms. Starks's affidavit that slightly relied on the Swanson letter. Dumbfounded by the betrayal, Petitioner gingerly filed a feeble reply on September 27, 2002 (T at 2(21-22)) believing he was technically barred by the Local Rules from filing a formal response (T at 23(23-24)).[6]

December Order - Not "Show Cause" Order. Against this background, the magistrate issued the following:

ORDER

> A hearing pursuant to **[Respondents']** request **for hearing on Rule 56(g) and for potential**

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[4] Petitioner wrote: "Defense counsel replied that she would conduct an investigation, however that her initial investigation had proven that this letter was a forgery." Plaintiff's Response to Motion for Summary Judgment, filed September 3, 2002, at p.11, ¶ 35.

[5] *See* technical explanation of flaws by Starks's expert Farrell C. Shriver in affidavit filed in district court on February 11, 2003.

[6] Thus, Petitioner "had no opportunity to withdraw or correct a faulty submission...." This means that the Eleventh Circuit's effort to distinguish *In re Pennie & Edmonds LLP*, 323 F.3d (2nd Cir.2003), is incorrect (33a; 43a).

> **violations of Rule 11(b) regarding [Starks's] submission of affidavit and document 12 in support of [Starks's] response to motion for summary judgment** is set for Thursday, January 9, 2003 at 10:00 a.m. before the undersigned.... (emphasis added) (132a)

Petitioner found this Order to be ambiguous. First, it was not addressed to any person. Second, Petitioner knew that Respondents had requested a hearing on Rule 56(g), but not on Rule 11(b), and presumed that the magistrate would correct her error at the hearing. While Respondents' motion under Rule 56(g) perfunctorily requested attorney's fees, Petitioner believed that they were solely interested in striking the Swanson letter. Indeed, Ms. Perrin disclaimed any monetary sanctions at the January 2003 hearing (T at 37(10-17)).[7]

Petitioner did not, nor did he have a reasonable basis to, construe this "Order" as a SHOW CAUSE ORDER as required by Rule 11(c)(1)(B) & (c)(2)(B) because, in this very case, the same magistrate had previously (April 23, 2002) issued a SHOW CAUSE ORDER (132a) that was addressed "to the parties."

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[7] THE COURT: Just for the record again, I believe you said earlier, [Ms.] Perrin, what were you seeking? I think I did write it down when you said it.
MS. PERRIN: Your Honor, **I did not ask for sanctions. I did not ask for any kind of finding of a Rule 11 violation. I only asked that the reply be stricken**.
THE COURT: That the reply –
MS. PERRIN: **I didn't even ask for attorney's fees**.
THE COURT: It was in the motion, but it was under the – it was all three in one, so it was in the motion.
MS PERRIN: I understand.
THE COURT: In the motion there was a request for attorney's fees, and, **No, you did not ask for rule 11. That was raised by the Court *sua sponte*** based on what I read here. (T at 37(7-20)) (emphasis added)

Magistrate's January Hearing (Oral Argument).[8]
(1) Hearing Was Not Evidentiary. The transcript discloses that nobody was sworn. Ms. Starks was not present (81a). After the hearing, notes were filed in district court indicating that it was not an evidentiary hearing, but merely oral argument.[9]
(2) Petitioner Distracted by Perrin Bombshell. At the outset of the January hearing, **Ms. Perrin unloaded again on the naïve Petitioner** disclosing, for the first time, that she had conducted an ***ex parte*** **deposition of Ms. Starks's daughter on August 20, 2002**, in the presence of another attorney, without sending notice to Petitioner. Hammered, Petitioner was flummoxed.[10]
(3) Magistrate's Focus on "Fraud on the Court" and Rule 11(c) Sanctions. The magistrate initiated the subject of "fraud on the court" at the January hearing.[11] The magistrate did not clearly raise the issue of *sua sponte* sanctions against Petitioner under Rule 11(c)(1)(B) until about 60 percent through the hearing. (T at 27, of a 42 page transcript).
(4) Magistrate's Recognition of Petitioner's Confusion about Possibility of Rule 11 Sanctions. The magistrate was on notice at the hearing that Petitioner had been confused about his procedural

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[8] *Obert v. Republic Western Ins. Co.*, 398 F.3d 138, 143 (1st Cir. 2005) ("[Hearing] is commonly used to describe oral argument on a motion.") (thus, hearing is broad enough to describe a chambers conference).
[9] "Oral argument/motion heard. (See attached for rulings)". (R-4-57; R3-55).
[10] MR. BREEDLOVE: *** **I am visibly**, obviously, Your Honor, **shaken by the revelation** here that counsel has spoken with my client's daughter and taken depositions on August 20th, and I am seeing them in January of 2003." (emphasis added) (T at 16(20-24)).
[11] THE COURT: *** To that extent we're here because the [Respondent], I assume, is seeking sanctions based on its motion for attorney fees and any other sanctions the Court deems appropriate if in fact a **fraud has been perpetrated on the Court**." (T at 8(24) to 9(2)).

alternatives after Ms. Perrin raised the issue of the authenticity of the Swanson letter.[12] The magistrate was also on notice that the Order she had entered had not actually notified him of the serious consequences that could flow from her pen:

"THE COURT: *** Do you know under Rule 56[g] you could be sanctioned? The [Respondents] can be awarded attorney's fees and costs. *** **I am not sure if you understand the serious nature of what has been going on, or [t]hat the [Respondent] alleges that a fraud has been [perpetrated] on the Court**." (T at 31(11-12)). ***

"THE COURT: *** Mr. Breedlove, I guess **I am not sure if you really get it**." (T at 33 (8-9)) (emphasis added)

(5) Petitioner's Disclosure of Initial Investigation into the Swanson Letter. While awaiting Ms. Perrin's report of her promised investigation into the authenticity of the Swanson letter, Petitioner conducted some investigation himself that he reported to the magistrate.[13] Petitioner felt stymied because he believed

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[12] THE COURT: *** [Regarding Ms. Perrin's concealment of information pertaining to the Swanson letter:] **I think the problem was your use of the term discovery**, and this was an independent investigation resulting from information you provided which was not, quote, unquote, discovery." (T at 23 (2-5)).
MR BREEDLOVE: *** I have been summoned here twice on motions to compel or hearings, this being the second one, with respect to things that should have been able to have been resolved between counsel...." (T at 31(1-4)).

[13] MR. BREEDLOVE: *** **We asked the workers' compensation firm that had the file before us whether they in fact had another copy**. *** They turned over their file to Ms. Starks who turned over their file to us...." (T at 24(4-6).
MR. BREEDLOVE: *** **I contacted a handwriting expert** [who advised that] I would need a copy of Ms. Swanson's handwriting...." (T at 26(17-18)).

that he had no legal means to compel Respondents to provide a genuine exemplar of Ms. Swanson's signature.

(6) Magistrate's Recognition that Petitioner was Reasonable to Rely on Perrin's Promise. Petitioner disclosed that he relied on Ms. Perrin's promises.[14] The magistrate credited him.

"THE COURT: *** **I will give you the benefit of the doubt. She was wrong, she should have given it to you.**" (T at 28 (19-20)).

(7) Respondent's Recognition that Petitioner Acted in Good Faith. Respondent's counsel stated on the record that Petitioner was innocent of any wrongdoing and had a pure heart.

"MS. PERRIN: *** **I do not know and, in fact, I have no reason to believe that Mr. Breedlove had any information as to the illegitimacy** of any of these documents or any of the testimony that his client was giving him. I have no evidence whatsoever to believe that he knew anything about this." (T at 14(13-18)).

(8) Respondent's Acknowledgment of Omission of Swanson Affidavit from the Record (Magistrate's Implicit Recognition that Petitioner Acted Reasonably). The magistrate inquired about the

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[14] MR. BREEDLOVE: *** **I was relying upon her word as an attorney of the court** that once she got this information she would provide it *** I was seduced into believing that if there was some question about this document before ... my answer to summary judgment was filed, I would be provided that and have the opportunity to make the decision whether I was going to use it or not." (T at 32(8-17)). ***

MR. BREEDLOVE: *** There was a **responsibility** ... a **duty** to provide that information to the other side." (T at 27 (20-23)

absence of a Swanson denial of authorship in the record,[15] but later failed to realize that Petitioner could have had, and did have, the very same doubts, resolved them in favor of his client, a part of the duty zealously to advocate for his client, for which he was most severely punished.

Petitioner's Post-Argument Investigation into Swanson Letter. After the January oral argument, Petitioner accomplished the following: (1) On January 28, 2003, he interviewed and obtained an affidavit from Starks's daughter, testifying that **Ms. Perrin had promised to pay her $15,000 to submit to the August 20, 2002 *ex parte* deposition trashing her mother's case due to her mother's threatening to throw her out of the house for not contributing to its upkeep ("the Robinson affidavit")**; (2) On January 28, 2003, Petitioner filed a "**Motion to Stay**" the proceedings until his expert handwriting expert (Farrell C. Shriver) had completed his investigation; (3) And on February 22, 2003, he filed the **expert affidavit** that a reasonable investigation could not determine whether the signature was authentic without auxiliary assistance, such as handwriting exemplars, testimony from Ms. Swanson, and extensive background investigation.

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[15] THE COURT: I have two questions for you[, Ms. Perrin]. **I notice in my review of the file that Ms. Swanson didn't provide an affidavit** attesting – you have indicated today that she didn't write it, but **I noticed** there wasn't an affidavit to that effect in the file.
MS. PERRIN: No, Your Honor. I can certainly provide you with one. That would be an oversight on my part.
THE COURT: **I wasn't sure if she just didn't remember it, or she's saying No, I didn't write it**. (T at 15(4-10).
THE COURT: If you can do it by the end of the week. I will only do that only because **that was the first thing when I started looking through the file, I said Well I don't have the author saying I didn't do it**, and so just for – I guess it would be good to have it for the file as the record goes up that matter – It's going to be taken care of one way or the other, I would assume. (T at 41(23) to 42(9)." (emphasis added)

Magistrate's Next Day's Report. On Jan. 29, 2003, a day after Petitioner filed his Motion to Stay supported by the Robinson affidavit, the magistrate issued her report, ignored the Robinson affidavit, overlooked transcribed findings favorable to Petitioner, found that the Swanson letter was a "forgery" (87a) and "fraudulent and that Plaintiff's affidavit was submitted in bad faith" (81a; 87a), that Ms. Starks and Petitioner had participated in a "fraud on the court" (87a), assessed $35,145.75 in Respondents' attorneys' fees against Ms. Starks, **recommended that the fees be imposed jointly and severally against Petitioner** (89a n.4), and recommended summary judgment against Ms. Starks (129a).

District Court's Order of March 2003. Petitioner filed exceptions to the magistrate's report (62a). On March 27, 2003, Senior Judge Shoob found the Swanson letter to be a "forged document." (71a). The judge went "ballistic" over Petitioner's claim (for Ms. Starks) that Ms. Perrin had offered Ms. Starks's daughter Robinson $15,000 to give the August 2002 *ex parte* deposition that her mother's lawsuits were not well founded ("the most scurrilous allegations imaginable" (69a); "such scurrilous and unsubstantiated charges" (57a); "egregious nature of the allegations it contains and its apparent lack of veracity (70a, 68a n.5)). Judge Shoob stated that Ms. Perrin was "a longstanding member of the bar who has an unblemished record of integrity and professionalism" (69a), implying personal knowledge thereof. He struck from the record the sworn affidavit of Ms. Robinson calling it "an inherently suspect and inflammatory document" (70a) and finding as fact – without any testimony in the record – that "it may have been manufactured" (69a). The judge did not advert to the possibility that a hearing should be held into authenticity and veracity, or that a deposition in the courthouse should be taken of Ms. Perrin and Ms. Robinson, or that the U.S. Attorney or the FBI should be called to

investigate possible criminal charges.[16] Instead, the judge entered a scathing, 28 page order adopted the magistrate's report that had found that Ms. Starks's affidavit "had been submitted in bad faith in furtherance of a fraud upon the Court." (58a 59a), imposed fees jointly and severally on both Starks and Petitioner (65a) under Rule 11(c) only,[17] and granted summary judgment to Respondents (70-71a). As a "*coup de grace*," the district court referred Petitioner to the State Bar of Georgia, to the U.S. Attorney, and to the district court's Disciplinary Committee for disciplinary and criminal prosecution (72a-73a). All authorities declined to take any action, period.[18]

First Appeals to Eleventh Circuit. Ms. Starks and Petitioner each took an appeal, and the appellate court (Black, Carnes, and Hull, JJ.) rendered a decision in each appeal on December 16, 2003 (29a, 38a). The court affirmed summary judgment against Ms. Starks on the ground that she failed to object substantively to the magistrate's recommendation and thus waived any objection (39a-40a). The court held that "[t]he hearing was a sanctions hearing and did not weigh or otherwise address trial issues. The magistrate did not exceed the scope of its authority." (43a)

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[16] Contrast Senior Judge Shoob's unequal actions toward Petitioner (black) and Ms. Perrin (white): He would not let Petitioner take the deposition of Ms. Robinson in 2003 (Order, May 29, 2003, 45a) and he would not take cognizance of Ms. Robinson's deposition taken in February 2004, in her workers' compensation case, that completely supported Robinson's affidavit of January 28, 2003, and repudiated the *ex parte* deposition of August 20, 2002 (Order, Nov. 19, 2004, 4a).

[17] The order does not mention Rule 56(g).

[18] Senior Judge Shoob concealed this information from the Eleventh Circuit in his Order of November 19, 2004 (4a), for Petitioner had submitted it in affidavit form attached to his motion for reconsideration which the order denied. Since the Eleventh Circuit decision of May 10, 2005 (1a), the State Bar of Georgia has recently proposed reciprocal punishment on Petitioner (not part of the record).

The court affirmed sanctions jointly and severally against her and Petitioner "for the submission of a fraudulent letter into the record." (44a, 34a). Held:

"Given that [Starks/Breedlove][19] (1) twice failed to conduct any investigation into the authenticity of the contested letter before submitting it in pleadings, and (2) declined to conduct any investigation prior to the sanctions hearing, [Starks/Breedlove] violated Rule 11." (33a, 42a).

In response to Starks's and Petitioner's citing of *In re Pennie & Edmonds, LLP*, 323 F.3d 1232 (2nd Cir. 2003), that requires a finding of **subjective bad faith** prior to imposing *sua sponte* sanctions on a lawyer under Rule 11(c)(1)(B), the court distinguished it unpersuasively.[20] Regarding the quality of the hearing and the magistrate's finding of "fraud on the court," the court trivialized the lack of reasonable notice to Petitioner that his own personal assets were at risk at the hearing.[21]

The Eleventh Circuit's view of Rule 11 is set forth as, "'While formal compliance with Rule 11(c)(1)(B) is the ideal, we apply a flexible standard, so in many cases

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[19] Much of the two appellate opinions is identical.

[20] "*Pennie*, however, which is not binding on this Court, was a narrow opinion only affecting cases where the sanctioned party had no opportunity to withdraw or correct a faulty submission, unlike here where [Starks/Breedlove] was sanctioned for [the] second submission of a challenged letter without first conducting any investigation into its authenticity. [cit. om.] Furthermore, we have not held the district court must find bad faith in order to impose sanctions." [cit. om.] (42a, 33a).

[21] "Breedlove further contends the district court erred by not holding an evidentiary hearing and erroneously finding he had committed a fraud on the court. Breedlove was sanctioned for violations of Rule 11, not committing a fraud on the court. Additionally, Breedlove's argument the district court failed to conduct an evidentiary hearing is without merit as Breedlove did not seek to present any evidence in his defense or otherwise show he had conducted an investigation into the authenticity of the letter." (33a-34a).

substantial compliance may suffice.", citing *Kaplan v. Daimler-Chrysler, A.G.*, 331 F.3d 1251, 1257 (11th Cir. 2003) and omitting internal citations (32a; *cf.* 43a). The court held that notwithstanding the fact that the December 11, 2002 order was not a "show cause" order, it "'substantially complied' with the requirements of Rule 11(c)(1)(B)." (34a).

Regarding the objection that the district court could not award attorneys' fees *sua sponte* to Respondent law firm, but any monetary penalty had to be paid into court, the appellate court adhered to obsolete precedent, *Aetna Ins. Co. v. Meeker*, 953 F.2d 1328, 1334 (11th Cir. 1992) (34a, 43a).[22] The court held that "the imposition of sanctions upon [Starks/Breedlove] for the submission of a fraudulent letter is affirmed, but the amount is vacated and remanded for the district court to consider [Starks'/Breedlove's] ability to pay" (34a, 44a). Implicitly therefore (*cf.* 30a n.2 & 39a n.1 *with* 35a & 44a), the Eleventh Circuit affirmed the district court's reference of Petitioner to the State Bar of Georgia, to the U.S. Attorney, and to the Disciplinary Committee for disciplinary and criminal prosecution (72a-73a). The court declined on jurisdictional grounds to rule on sanctions for a "frivolous motion to stay" (30a n.2; 39a n.1).

Upon remand, district court issued imprecise direction for submission of financial information. In his April 2, 2004 order the Senior Judge ordered Starks and Petitioner "to file with the Court a sworn statement of their current financial condition, including a complete listing of their current income, assets, and liabilities. After considering these submissions, the Court will determine the appropriate amount of sanctions to be imposed." (27a-28a).

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[22] "[A]lthough [Starks/Breedlove] contends the district court lacked the power to *sua sponte* award sanctions to McCalla, we have affirmed the award of sanctions to parties under Rule 11, even though the issue of sanctions was raised *sua sponte*. *See, e.g., Aetna Ins. Co. v. Meeker*, 953 F.2d 1328, 1334 (11th Cir. 1992)." (34a, 43a)."

Although the order did not specify whether Petitioner and Ms. Starks were to follow "generally accepted accounting principles" or the cash or accrual method, each prepared an affidavit. In an Order of May 25, 2004, the district court -- without any request from Respondents – deputized Respondent law firm to conduct such discovery of Petitioner as they pleased.[23]

Inquiry into Petitioner's Financial Assets. For almost all of the 30 days allowed for discovery by the April 2, 2004 order, the Respondents did nothing. Finally, they filed minimal discovery and then applied to the Senior Judge for an extension of time and the court granted an additional 45 days by order of June 30, 2004 (21a). During the three months of June, July, and August, Respondents took the deposition of Petitioner and submitted extensive interrogatories to and requests for production of documents from him and his law firm that engages in a contingency fee law practice.

District Court's Order of September 30, 2004. The docket proves that on February 12, 2003 (#63, 1414; #62, 1749), the Respondents filed their one and only response to the Motion to Stay, and the response was 15 pages long with four short affidavits attached thereto.[24] It will be

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[23] "After reviewing the affidavits, it appears to the Court that neither Starks nor Breedlove has the ability to pay any sanctions at all. Before making a final determination, however, the Court will give defendants the opportunity to be heard on the appropriate amount of sanctions, if any, that the Court should impose, taking into account Starks' and Breedlove's ability to pay. If **defendants** desire, they **will be permitted to conduct whatever reasonable discovery they may deem necessary** prior to making their recommendation to the Court." (24a).

[24] Attached were the (1) three-page February 10, 2003 affidavit of Ms. Swanson; (2) seven-page affidavit of Ms. Perrin; (3) three-page affidavit of a law firm employee; and (4) seven-page affidavit of the other attorney who conducted the *ex parte* deposition of Ms. Robinson in August 2002. Total pages of response (15) and affidavits (20) divided into $43,890.83, means that Judge Shoob awarded over $975 per page. On what basis could such an award be reasonable for a motion held to be "moot" the day after Petitioner filed it? (72a).

recalled that the Motion to Stay was filed on January 28, 2003, and the magistrate entered her report the next day mooting the motion. Notwithstanding, the district court entered severe sanctions on September 30, 2004.[25]

Thwarted Deposition of Starks's Daughter Confirms Attempted Bribe – Which District Court Ignores. Turning back to May 21, 2003, after the court had entered Order of March 27, and Petitioner and Ms. Starks had filed notices of appeal, Ms. Starks filed motion

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[25] "[T]he Court has reviewed the affidavit and supporting documentation submitted by defendants' counsel [Ms.Perrin] setting forth a total of $43,890.83 in expenses, including attorneys' fees, incurred in responding to the motion to stay. The Court finds that this amount is reasonable and constitutes the appropriate amount of sanctions for Starks' and Breedlove's filing of the frivolous motion to stay." (14a-15a).

"The Court also concludes that, in light of the seriousness of the violations and their **repeated** nature, the Court should impose the **maximum monetary sanction** that Starks and Breedlove can realistically pay. Without the imposition of such monetary sanctions, the Court finds that Starks and Breedlove will be neither punished for their past conduct nor deterred from engaging in such conduct in the future." (15a-16a)

"As to Breedlove, the Court finds that his affidavit does not accurately represent his financial condition. The affidavit fails to take into account the equity in Breedlove's home *** Breedlove also failed to disclose his and **his wife's income** from part-time employment. *** The Court concludes that Breedlove has the ability to pay sanctions in the total amount of $79,036.58...." (16a)

"Finally, because Starks and Breedlove are unable to pay anywhere near the entire amount reasonably owed to defendant as sanctions, the Court concludes that non-monetary sanctions are appropriate as a further punishment and deterrent. As to Breedlove, the Court finds that an appropriate non-monetary sanction in a public reprimand and this order shall serve as that reprimand. To publicize the reprimand, **Breedlove shall be required to provide a copy of this order to all courts and opposing counsel in all cases he currently has pending or which he files within 12 months** of the date of entry of this order." (17a; note omitted).

"As to Starks, *** The form of the letter ... must include an express **apology ... for the false allegations leveled against Ogletree, Deakins' late partner, Martha Perrin.**" (17a-18a).

for leave to take the deposition of Starks's daughter about the attempted bribe by Ms. Perrin under Rule 27(b), Fed.R.Civ.P. Judge Shoob's law clerk telephoned Petitioner's law office and directed him not to take the deposition (47a). Then the judge denied both this motion and a motion for a Rule 60 hearing by Order filed May 29, 2003, that reiterates his finding of, "a highly suspect affidavit of plaintiff's daughter, April Robinson, which accused defense counsel [Ms. Perrin] of bribery and suborning perjury" (46a). The court acknowledges that, "plaintiff and her counsel seek to obtain the testimony of these witnesses in order to respond to allegations that the Swanson letter was forged and that the April Robinson affidavit was false and may have been fabricated." (48a). The court denied the motions (49a).

While Petitioner was representing Starks in her assertion of civil rights claims, his law partner, Jule C. Lassiter, III, was representing Ms. Starks in her workers' compensation claim against Respondent law firm. In the course of that representation, the deposition of Starks's daughter was taken and transcribed. **Under oath, Ms. Robinson confirmed the veracity of statements in her January 28, 2003 affidavit that Ms. Perrin had indeed offered her $15,000 to make untrue statements at the August 2002 *ex parte* deposition.** Further, Ms. Robinson repudiated the untrue statements in the *ex parte* deposition. Based upon it Ms. Starks and Petitioner moved the district court for reconsideration of the September 2004 sanctions order and to give appropriate weight to the testimony of Ms. Robinson as reflected in her 2004 deposition. Overlooking his denial in May 2003 of Ms. Starks's motion to take Robinson's deposition in 2003, Judge Shoob remarked, "However, movants fail to explain why such evidence could not have been submitted previously." Not surprisingly, he denied the motion (5a).

Second Appeal to Eleventh Circuit. Ms. Starks declined to appeal the district court's award of $5,000 in

monetary sanctions against her, but Petitioner took an appeal and made an argument on her behalf (3a n.2). The appellate court (Black, Carnes, and Marcus, JJ.) rendered a decision on May 10, 2005. With respect to Petitioner's effort to obtain appellate relief from the May 29, 2003 order denying the Rule 27(b) deposition pending appeal, the court stated: "In his initial brief, Breedlove also appeals a May 29, 2003 order denying Breedlove's request for a deposition and his Rule 60(b) motion. This order was not timely appealed and we do not address it." (2a n.1). The appellate court summarily affirms (1) the award of $43,890.83 in monetary sanctions against Petitioner "(the amount of McCalla's expenses and attorneys' fees for the frivolous motion to stay)", (2) the award of non-monetary sanctions against him without identifying them, and (3) the finding that Petitioner has the ability to pay a total of $79,036.58 ($35,245.75 plus $43,890.83) in sanctions. (2a).

REASONS *CERTIORARI* SHOULD BE GRANTED

(1) NO SUPREME RULING ON 1993 AMDT. Rule 11 was amended effective Dec. 1, 1993, after substantial revisions in 1983 proved to be counterproductive. The Supreme Court decided several cases under the 1983 version,[28] but not the 1993 amendment. The amended rule has matured, the circuits are split, and the facts at bar are amenable to important, black letter applications.

(2) RULE 11(c)(1)(B) REQUIRES "SHOW CAUSE" ORDER "DESCRIBING THE SPECIFIC CONDUCT THAT APPEARS TO VIOLATE [RULE 11](b)."

Rule 11(c)(1)(B) (*On Court's Initiative*) provides: "On its own initiative, the court may enter an **order** describing the specific conduct that appears to violate

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[28] *E.g., Business Guides, Inc. v. Chromatic Comm. Enter., Inc.*, 498 U.S. 533 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Pavelic & LeFlore v. Marvel Enter. Group*, 493 U.S. 120 (1989).

subdivision (b) and directing an attorney, law firm, or party **to show cause** why it has not violated subdivision (b) with respect thereto." (emphasis added) (137a)

To Petitioner's argument that the magistrate's Dec. 2002 "Order" was insufficient compliance, the **Eleventh Circuit** stated in 2003: "Breedlove complains the district court failed to issue a formal show cause order prior to holding a hearing regarding sanctions. The magistrate issued an order on December 11, 2002, setting a hearing for January 9, 2003, '[p]ursuant to Defendant's request for a hearing on Rule 56(g) and for potential violations of Rule 11(b)....' This order satisfied the requirements of Rule 11, as it 'substantially complied' with the requirements of Rule 11(c)(1)(B). *See Kaplan [v. Daimler-Chrysler, A.G.]*, 331 F.3d [1251] at 1257 [(11th Cir. 2003)]").

This decision is obviously wrong because Petitioner was reasonably surprised by the tenor of the hearing and suffered legal prejudice. This is supported by the fact that **the Seventh and Ninth Circuits disagree with the Eleventh Circuit**: In *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 151-152 (7th Cir. 1996) (*per curiam*), where the judge did not employ a show cause order, the **Seventh Circuit** stated: "[T]he procedure mandated for a district court's imposition of sanctions on its own initiative was not followed *** Thus, the district court abused its discretion by declining to apply the procedure required by Rule 11(c)(1)(B) and letting stand its imposition of sanctions against Johnson." The **Ninth Circuit** in *United Nat'l Ins. Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1116 (9th Cir. 2001), noted that an order to show case was issued. The court reversed sanctions, holding, "*sua sponte* sanctions 'will ordinarily be imposed only in situations that are *akin to a contempt of court*.'"

Compare G.M. Variro, *Happy(?) Birthday Rule 11: Foreword*, 37 Loyola L.A. Law. Rev. 516, 533 (2004), which observes that "there are some signs that some

courts of appeals are incorrectly loosening the technical requirements [of the safe-harbor standard]. Instead of treating the safe-harbor requirement as jurisdictional in nature, some courts are, unfortunately, according to the authors, moving to a waiver model of enforcement."

(3) FIFTH AMENDMENT REQUIRES ADEQUATE NOTICE THAT LIBERTY AND PROPERTY ARE AT STAKE IN RULE 11 LITIGATION.

The magistrate's "Order" (132a) is not addressed to anyone, unlike her "ORDER TO SHOW CAUSE." (130a). It was filed in an action in which Petitioner was not a party, but merely an attorney for a party. Before he entered the magistrate's hearing, he did not have notice that his liberty or property might be taken. He was not on notice to produce witnesses in his defense, or to hire counsel. The lower courts deprived Petitioner of liberty and property without due process of law in violation of the Fifth Amendment.

In affirming sanctions against Petitioner, **the Fifth and Seventh Circuits disagree with the Eleventh Circuit**: *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 151 (7th Cir. 1996) (*per curiam*) ("The formality imposed on district judges when acting on their own initiative under Rule 11(c)(1)(B) was intended to ensure due process."); *Thornton v. General Motors Corp.*, 136 F.3d 450, 455 (5th Cir. 1998) ("The requirement imposed on district courts when acting on their own initiative under Rule 11(c)(1)(B) was intended to ensure due process."). Whether the Fifth Amendment was cited in district court, this argument was raised in the Eleventh Circuit, constitutes plain error under *United States v. Olano*, 507 U.S. 725 (1993) (a plain error in a criminal case that affects substantial rights may be considered even though it was not brought to the court's attention); *Brickwood Contr., Inc. v. Datanet Eng., Inc.*, 369 F.3d 385 (4th Cir. 2004) (*en banc*) (plain error re: 21-day rule in Rule 11 case).

(4) THE FIFTH AMENDMENT REQUIRES AN EVIDENTIARY HEARING PRIOR TO IMPOSITION OF RULE 11(c)(2) SANCTIONS WHERE PROCEEDINGS ARE "AKIN TO CRIMINAL CONTEMPT," PROPOSED SANCTIONS ARE RUINOUS, AND THE JUDGED IS PERSONALLY OUTRAGED.

The most casual perusal of the orders of the magistrate and district judges results in a horrifying realization that they are determined to drive Petitioner out of the legal profession and into bankruptcy. Consider, for example, the requirement that Petitioner provide all opposing counsel and all courts of Judge Shoob's orders. It would not take long for those orders to be brought to the attention of Petitioner's clients and potential clients. But Rule 11(c) does not require a judge under any circumstances to afford a hearing to the respondent, much less an evidentiary hearing.[27] At one time **the Eleventh Circuit** seemed to adopt a discretionary rule to hold evidentiary hearings when the court's charges were "akin to contempt." *See Donaldson v. Clark*, 819 F.2d 1551, 1562 (11th Cir. 1987) (*en banc*) (concurrence by Johnson, Tjoflat, Kravitch, Hatchett, JJ.). But by not directing a remand for evidentiary hearing in the instant case, the Eleventh Circuit has clearly indicated that there is no requirement for such a hearing.[28]

Petitioner contends that the *sua sponte* proceedings against him were "hybrid criminal contempt" (term used in criminal case, *United States v. North*, 621 F.2d 1255, 1264 (3rd Cir. 1980)) because of the overly punitive and vindictive sanctions. Whether the Rule 11(c) proceedings against Petitioner were just that is a

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[27] *Obert v. Republic Western Ins. Co.*, 398 F.3d 138, 143 (1st Cir. 2005) acknowledges that the word "hearing" has a variety of meanings in a legal context. For example, hearing can describe chambers conference and is commonly used to describe oral argument on a motion.

[28] For a recent exposition of criminal contempt in the Eleventh Circuit in a Rule 11 case, *see Byrne v. Nezhat*, 261 F.3d 1075, 1131-32 & accompanying notes (11th Cir. 2001).

federal question. *Cf. Hicks v. Feiock*, 485 U.S. 624, 630 (1988) (concerning CA child support proceeding) (when there is a mixture of civil and criminal elements in a coercive order, the criminal aspect of the order fixes its character for purposes of review). Therefore, Petitioner was entitled to some of the protections afforded to those accused of criminal contempt – an evidentiary hearing.

In ignoring Petitioner's claims that he was subjected to hybrid criminal contempt, **the D.C. & First Circuit would disagree with the Eleventh Circuit.** *United States v. Kouri-Perez*, 187 F.3d 1, 8 (1st Cir. 1999) (district court imposed $4,000 fine in criminal case for violation of civility order that was described as neither civil nor criminal contempt); the **D.C. Circuit** in *United States v. Rapone*, 131 F.3d 188, 195-97 (D.C. Cir. 1997) (42 U.S.C. § 2000h affords a jury trial in any proceeding for criminal contempt arising under a claim filed under Title VII); as well as the **Supreme Court** in *International Union, UMWA v. Bagwell*, 512 U.S. 821, 831 (1994) (criminal contempt fine reversed for lack of adjudication of guilt by jury).

(5) RULE 11(c)(2)(B) REQUIRES AN ORDER DIRECTING PAYMENT OF MONEY INTO COURT ITSELF, AND NOT TO A PARTY

Rule 11(c)(2) provides in part: "[T]he sanction may consist of, or include, directives of a nonmonetary nature, **an order to pay a penalty into court**, or if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." (138a).

In the 2003 decisions, the Eleventh Circuit affirmed the fee award to Respondent law firm relying on *Aetna Ins. Co. v. Meeker*, 953 F.2d 1328, 1334 (11th Cir. 1992), notwithstanding the obvious fact that *Meeker* was obsolete because decided under the 1983 version of Rule 11 and before the December 1, 1993 effective date of the 1993 version made *sua sponte* orders payable solely to the

court. In so ruling the **Eleventh Circuit disagrees with two decisions of the Seventh Circuit**: *Vollmer v. Publishers Clearing House, Inc.*, 248 F.3d 698, 711 n.11 (7th Cir. 2001) ("a district court would abuse its discretion if, on its own initiative, it imposed a sanction based on attorneys' fees.") (court should not have ordered that sanctions be paid to charity because same must be paid to court); and *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 152 n.3 (7th Cir. 1996) ("Here the district court awarded sanctions in the sum of $500 payable to Waddell & Reed and the sum of $300 payable to [the U.S.]. Even if the 'show cause' procedure of Rule 11 had been followed the portion of the award of sanctions payable to Waddell & Reed would nevertheless have been improper.").

Eleventh Circuit also disagrees with Fifth Circuit. *Thornton v. General Motors Corp.*, 136 F.3d 450, 455 (5th Cir. 1998) (*per curiam*) ("Moreover, where sanctions are imposed under Rule 11(c)(1)(B) by a district court on its own initiative, neither the award of attorney's fee nor the suspension from practice before the court constitute a valid sanction.").

Further, the **Eleventh Circuit disagrees with decisions of Second and Eighth Circuits**: *Norsyn, Inc. v. Desai*, 351 F.3d 825, 831 (8th Cir. 2003) ("Although Rule 11 places within the district court's arsenal the ability to award reasonable expenses and attorney fees, that sword may only be wielded upon the request of the opposing party. *See* Fed.R.Civ.P. 11(c)(2) (permitting an award of all or some of attorney fees and costs incurred as a direct result of the violation *'if imposed on motion and warranted for effective deterrence'...; see also Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 94 (2d Cir. 1999) ("By its terms, [Rule 11] thus precludes a court from awarding attorneys' fees on its own initiative.")."

Finally, the Eleventh Circuit disregards the Supreme Court language in *Business Guides, Inc. v. Chromatic Comm. Enter., Inc.*, 498 U.S. 533, 553 (1991), that the pre-1993 Rule 11 calls only for an appropriate

sanction, but **"attorney's fees are not mandated.** *** The main objective of the **Rules is not to reward parties who are victimized by litigation**; it is to deter baseless filings and curb abuses." Consider also the statement in *Pavelic & LeFlore v. Marvel Enter. Group*, 493 U.S. 120, 123 (1989), that, "We give the Federal Rules of Civil Procedure their plain meaning."

Obert v. Republic Western Ins. Co., 398 F.3d 138, 146 (1st Cir. 2005), suggests in *dictum* that the First Circuit might agree with the Eleventh Circuit.

(6) RULE 11(c) REQUIRES FINDING THAT THE ATTORNEY ACTED IN "SUBJECTIVE BAD FAITH"

Petitioner cited to the Eleventh Circuit the **Second Circuit** decision *In re Pennie & Edmonds LLP*, 323 F.3d 86, 91 (2nd Cir. 2003), in which *sua sponte* sanctions were vacated because the lawyers' assertion that they did not act in "subjective bad faith" was accepted as true by the district court. The court stated the policy reasons for its decision this way:

'A vigorous adversary process is better served by avoiding the inhibiting effect of an 'objectively unreasonable' standard applied to unchallenged submissions, and letting questionable evidence be tested with cross-examination and opposing evidence than by encouraging lawyers to withhold such evidence. It is better to apply a heightened *mens rea* standard to unchallenged submissions and take the slight risk with respect to such submissions that, on occasion, a jury will give unwarranted weight to a few submissions that a judge would consider objectively unreasonable than to withhold from the jury many submissions that are objectively reasonable but that cautious lawyers may not present."

To Petitioner's citation, the Eleventh Circuit replied: "*Pennie*, however, which is not binding on the Court, was a narrow opinion only affecting cases where the sanctioned party had no opportunity to withdraw or

correct a faulty submission, unlike here where Breedlove was sanctioned for his second submission of a challenged letter without first conducting any investigation into its authenticity.[29] *Kaplan [v. Daimler-Chrysler, A.G.]*, 331 F.3d [1251] at 1255-56 [(11th Cir. 2003)]; *Pennie*, 323 F.3d at 91-92. Furthermore, we have not held the district court must find bad faith in order to impose sanctions. *See Kaplan*, 331 F.3d at 1256."

The Eleventh Circuit is wrong that Petitioner had an opportunity to reflect after he filed the Swanson letter as an exhibit to his brief in support of the motion to amend complaint. To that motion, Respondent filed a mere denial of authenticity, nothing different from its May 30, 2002 letter. Therefore, Petitioner did not have a "second" opportunity to sit and reflect before filing the letter as a response to the motion for summary judgment.

Not only the Second but also the **Third Circuit disagrees with the Eleventh Circuit.** *See Martin v. Brown*, 63 F.3d 1252, 1264 (3rd Cir. 1995) ("The district court's failure to relate its general grounds to [attorney] Bender's conduct (and her conduct alone) requires us to vacate its order sanctioning her and to remand this case for further proceedings in which the district court will have an opportunity to **elaborate on Bender's** conduct, as well as her **state of mind**, and identify the legal bases for each sanction imposed against Bender." (emphasis).

The **Fourth Circuit** in *Brickwood Contractors, Inc. v. Datanet Eng., Inc.*, 369 F.3d 385, 389 (4th Cir. 2004) (*en banc*), cites *Pennie & Edmonds* favorably. But the **First Circuit** criticized *Pennie* in *Young v. City of Providence*, 404 F.3d 33, 40 (1st Cir. 2005) (administratrix of off-duty policeman who was killed by on-duty policemen was assessed with sanctions). In vacating sanctions, the court stated: "A specific purpose of the 1993 revision of Rule 11 was to reject such a bad faith

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[29] [Ed.: This finding of fact is clearly erroneous. Petitioner did conduct some investigation. *See* Statement of the Case.]

requirement. *** Since then only one circuit court has read the present rule to require bad faith, *In re Pennie & Edmonds LLP*..., and it did so in the teeth of a strong dissent....True, judges must be especially careful where they are both prosecutor and judge...." And of course, in *Business Guides, Inc. v. Chromatic Comm. Enter., Inc.*, 498 U.S. 533, 548-49 (1991), the **Supreme Court** observed that in amending the Rule in 1983, the Advisory Committee deleted the existing subjective standard and replaced it with an objective one.

(7) RULE 11(c)(1)(B) REQUIRES PLACING ON BENEFICIARY OF SANCTION THE BURDEN OF PROOF BY CLEAR AND CONVINCING EVIDENCE

There are two more problems with the **Eleventh Circuit**'s treatment of Petitioner. In the first place the court did not state **who has the burden of proof** on Rule 11(c)(1)(B) sanctions. Since the court is prosecutor, *Young v. City of Providence*, 404 F.3d 33, 40 (1st Cir. 2005) ("True, judges must be especially careful where they are both prosecutor and judge...."), the court must decide which entity shall prosecute sanctions -- the court or the defendant law firm? **And what is the quantum of proof to establish a violation**? Is it preponderance of evidence or clear and convincing evidence? The Eleventh Circuit issued contradictory signals. On the one hand, it states: "'The initiating court must employ ... (2) a higher standard ('akin to contempt') than in the case of party-initiated sanctions." [citing *Kaplan*]'" (31a, 41a), but on the other hand, the first panel observes: "An objective standard of reasonableness under the circumstances governs whether Rule 11 has been violated." (*ibid*).

As argued elsewhere, the proceedings against Petitioner were "hybrid criminal contempt," and the **Supreme Court** distinguished between criminal and civil contempt in *Hicks v. Feiock*, 485 U.S. 624, 637-38 (1988), by stating that a finding of criminal contempt requires proof beyond a reasonable doubt whereas a finding of civil contempt merely requires a preponderance

of the evidence. Petitioner suggests that **the appropriate standard of proof of a violation of Rule 11(c)(1)(B) is clear and convincing evidence** and cites to the **Second Circuit** opinion in *Barr Rubber Prods. Co. v. Sun Rubber Co.*, 425 F.2d 1114, 1120 (2nd Cir. 1970): "At the outset we are troubled by the lower court's failure to define the quantum of proof required to substantiate a charge of perjury in a civil, noncriminal case of this kind. *** However, there is ample authority of long standing that ... a **litigant must present 'clear and convincing proof.'**."

(8) RULE 11(c)(2) REQUIRES ASSESSMENT OF THE IMPACT THAT NON-MONETARY SANCTIONS MIGHT HAVE ON ATTORNEY AND STATE-FEDERAL RELATIONS

Rule 11(c)(2) provides in part: "[T]he sanction may consist of, or include, directives of a nonmonetary nature ***." The Advisory Committee's Note suggests that a possible non-monetary sanction under Rule 11 may be referring the matter to disciplinary authorities. 28 U.S.C.A.: Rules 1 to 11, 2005 Supp. 425. This would avoid any conflict with the states over their traditional role as enforcers of disciplinary standards against lawyers licensed in their jurisdiction. But in one study, only four of 2,000 cases actually "involved the imposition of a sanction of referral for professional discipline." G. M. Vairo, *Happy (?) Birthday Rule 11: Foreword*, 37 Loyola L.A. Law R. 537 (2004), citing to P.A. Joy, *Relationship Between Civil Rule 11 and Lawyer Discipline*, 37 Loyola L.A. Law R. 765 (2004).

Here, though, after the Senior Judge referred Petitioner to state disciplinary authorities – who exonerated Petitioner – the judge imposed additional, ruinous, non-monetary sanctions that will have the effect of driving Petitioner out of law practice and bankrupting him. The judge thus ignored the rejected attempts to make Rule 11 into a federal regime of lawyer discipline. Vairo, 37 Loyola L.A. Law R at 545. Correction required.

(9) RULE 11 SHOULD NOT PERMIT COURT'S DEPUTIZING RESPONDENT LAW FIRM TO CONDUCT LIMITLESS DISCOVERY

As stated above, the district court at first concluded that neither Petitioner nor Starks's had the financial capacity to pay any sanctions. Then the court appointed the Respondent law firm to conduct unlimited discovery of Petitioner to determine whether the financial affidavits were correct. Then ensued extensive and expensive examination. The appointment of a party defendant to conduct such discovery under the circumstances of this case violated ethical norms, and the Supreme Court should correct same under its supervisory authority. *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 808-09 (1987) (appointment of plaintiff's counsel to conduct criminal contempt proceeding against an alleged trademark infringer violated ethical standards and the court would prohibit the practice under its "supervisory authority."). Thus the **Supreme Court would differ with the Eleventh Circuit and possibly the First Circuit**. *See Obert v. Republic Western Ins. Co.*, 398 F.3d 138, 142 (1st Cir. 2005) (filing a hopeless recusal motion did not support award of $30,000 in attorney fees as Rule 11 sanctions, but no other condemnation of judge who had invited a party's attorney to move for sanctions and had awarded $31,000 in sanctions payable primarily to that attorney).

(10) RULE 11 REQUIRES DETERMINATION THAT PREVAILING PARTY MITIGATED ITS DAMAGES

Respondent law firm is the prevailing party, but the district court did not require mitigation of damages. The reason is obvious: the court wanted to impose as much monetary damages against Petitioner as he could afford (and very severe non-monetary damages to humiliate and bankrupt him, as well). Similarly, the **Eleventh Circuit did not require mitigation of damages**. Respondent could have mitigated its damages

in several ways: (1) Ms. Perrin could have fulfilled her promise to and advised Petitioner prior to his response to her client's motion for summary judgment that she had obtained an expert opinion that the Swanson letter was a forgery. Petitioner would then have declined to file the letter as document 12. (2) Respondent law firm could have reduced its expenses in response to the January 28, 2003 Motion to Stay as it was mooted the next day by the magistrate's report from $43,890.83 to, say, $1,000.

In such lax enforcement of Rule 11, the **Eleventh Circuit disagrees with the Second, Third, Fifth, Sixth, Seventh, and Ninth Circuits**: *See Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir. 1986); *Doering v. Union Co.*, 857 F.2d 191, 196 (3rd Cir. 1988); *Pollution Control Indus. of Amer. v. Van Gundy*, 21 F.3d 152, 156 (5th Cir. 1994); *Danvers v. Danvers*, 959 F.2d 601, 605 (6th Cir. 1992); *Wojan v. General Motors Corp.*, 851 F.2d 969, 975 (7th Cir. 1988); *In re Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1986). Thus, the Supreme Court should grant the writ to correct the misinterpretation of Rule 11(c) by the Eleventh Circuit.

CONCLUSION

The Eleventh Circuit encourages enforcement of Rule 11 sanctions against plaintiffs' attorneys. Here the brunt fell on a civil rights attorney and his client. The circuit permits a loose interpretation of Rule 11 that is contrary to the letter and spirit of the Rule and decisions of the Supreme Court and nearly all other circuits. There is a compelling reason to grant *certiorari* to bring the Eleventh Circuit into line with Supreme Court precedent and the better reasoned decisions of other circuits.

This 10th day of October, 2005.

Jule Clifton Lassiter, III
Attorney for *Petitioner*

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-15428
Non-Argument Calendar

D. C. Docket Nos. 01-01414-CV-MHS-1
and 01-01749-CV-MHS

QUEEN STARKS,

Plaintiff-Appellant,

LEVI BREEDLOVE

Movant-Appellant,

versus

MCCALLA, RAYMER, PADRICK,
COBB, NICHOLS & CLARK, LLC,
CHRISSA HAMMOND, in official
capacity and personally, et. al,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed May 10, 2005)

Before BLACK, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

In an earlier opinion, this Court affirmed in part, and vacated and remanded in part the district court's imposition of sanctions against Levi Breedlove for the submission of a fraudulent letter into the record. We affirmed the imposition of sanctions, but vacated and remanded because the district court failed to consider Breedlove's financial state prior to determining the proper amount of sanctions. On remand, the district court found Breedlove had the ability to pay $35,145.75 for the submission of the fraudulent letter. Also before the district court were two related matters not addressed in the appeal: (1) the appropriate amount of sanctions against Breedlove for filing a frivolous motion to stay, and (2) McCalla, Raymer, Padrick, Cobb, Nichols & Clark's (McCalla's) motion for an award of all attorneys' fees, costs, and expenses incurred in defending this suit. Breedlove appeals the district court's (1) award of sanctions in the amount of $43,890.83 against him (the amount of McCalla's expenses and attorneys' fees for the frivolous motion to stay), (2) award of non-monetary sanctions against him, and (3) finding he had the ability to pay a total of $79,036.58 ($35,145.75 plus $43,890.83) in sanctions.[1]

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[1] In his initial brief, Breedlove also appeals a May 29, 2003 order denying Breedlove's request for a deposition and his Rule 60(b) motion. This order was not timely appealed and we do not address it.

Breedlove further appeals the district court's procedure for determining his ability to pay, including the district court's April 4, 2004 order requiring him to file with the court evidence of his current financial condition, a May 25, 2004 order allowing discovery on his financial condition, and a June 30, 2004 order extending the time for McCalla to conduct discovery. We affirm the district court as to these issues.

After a careful review of the record and the parties' briefs, we find the district court did not abuse its discretion and affirm for the reasons stated in the district court's well-reasoned September 30, 2004 order.[2]

AFFIRMED.

[2] Even though Breedlove no longer represents his client Queen Starks, he appeals the sanctions against her as well. Of course, because he is not Starks' attorney, he lacks standing to challenge the sanctions against her. *See Smith v. South Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, et al., Defendants.	:	CIVIL ACTION 1:01-CV-1414-MHS
QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, Defendant.	:	CIVIL ACTION 1:01-CV-1749-MHS

ORDER

(Filed Nov. 19, 2004)

These consolidated cases are before the Court on plaintiff Queen Starks' and her attorney, Levi Breedlove's, motion for reconsideration of the Court's Order of September 30, 2004, awarding sanctions against Ms. Starks in the amount of $5,000 and against Mr. Breedlove in the amount of $79,036.58.

Motions for reconsideration are not favored and "shall not be filed as a matter of routine practice." LR 7.2E, NDGa. In general, a motion for reconsideration should not be filed absent new precedent, newly discovered evidence,

or need to correct clear error. *See Stamey v. S. Bell Tel. & Tel. Co.*, 658 F. Supp. 1152, 1154 (N.D. Ga. 1987); *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988). A motion for reconsideration is not a vehicle for the seriatim presentation of theories that were available when the initial motion was filed. *See Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990). Nor should a motion for reconsideration be used to rehash arguments already made or to refute the court's ruling. *Shields*, 120 F.R.D. at 126 (D. Colo. 1988) ("A motion for reconsideration is not a license for a losing party's attorney to get a 'second bite at the apple' ").

Plaintiff and Mr. Breedlove have not demonstrated any new precedent, newly discovered evidence, or clear error. Instead, they simply rehash old arguments that the Court has already considered and rejected. In addition, they ask the Court to conduct a hearing so that they may introduce additional evidence regarding their financial status and the genuineness of an affidavit submitted by plaintiff's daughter. However, movants fail to explain why such evidence could not have been submitted previously. A motion for reconsideration may not be used to present evidence that was available during the original proceedings.

Accordingly, for the foregoing reasons, the Court DENIES plaintiff's and Levi Breedlove's motion for reconsideration [#115-1].

IT IS SO ORDERED, this 19 day of November, 2004.

/s/ Marvin Shoob
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Queen Starks, Plaintiff, vs. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, et al, Defendants.	CIVIL ACTION FILE NO. 1:01-cv-1414-MHS
Queen Starks, Plaintiff, vs. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, Defendant	CIVIL ACTION FILE NO. 1:01-cv-1749-MHS

JUDGMENT

This action having come before the court, Honorable Marvin H. Shoob, United States District Judge, on remand from the Eleventh Circuit Court of Appeals for determination of the appropriate amount of sanctions to be imposed upon plaintiff and her attorney, Levi Breedlove, and for consideration of defendants' motion for attorneys' fees, costs and expenses, and the court having made such a determination and granted said motion, it is

Ordered and Adjudged that the defendants are awarded sanctions against plaintiff Queen Starks, individually, in the amount of $5,000.00 and against plaintiffs counsel, Levi Breedlove, individually, in the amount of $79,036.58.

Dated at Atlanta, Georgia, this 4th day of October, 2004.

LUTHER D. THOMAS
CLERK OF COURT

By: s/ Evelyn Rivera
Evelyn Rivera, Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
October 4, 2004
Luther D. Thomas
Clerk of Court

By: s/ Evelyn Rivera
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, et al., Defendants.	:	CIVIL ACTION 1:01-CV-1414-MHS
QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, Defendant.	:	CIVIL ACTION 1:01-CV-1749-MHS

ORDER

(Filed Sep. 30, 2004)

These consolidated cases are before the Court on remand from the Eleventh Circuit for determination of the appropriate amount of sanctions to be imposed upon plaintiff Queen Starks and her attorney, Levi Breedlove, taking into consideration their ability to pay. Also before the Court are two related matters that were not addressed in the appeals. First is the appropriate amount of attorney's fees and expenses to be imposed upon Starks and Breedlove as sanctions for the filing of a frivolous motion to stay. Second is defendants' motion for an award of all attorneys' fees, costs, and expenses incurred in defending these actions. In light of the court of appeals' decision

regarding the first sanctions award, as well as other Eleventh Circuit precedent, it is clear that the Court must consider Starks' and Breedlove's ability to pay before imposing any additional amount of sanctions in connection with either of these other two requests.[1]

Background

On March 13, 2003, the Court imposed Rule 11 sanctions on Starks and Breedlove, jointly and severally, in the amount of $35,145.75. The basis for the award of sanctions was Starks' and Breedlove's submission of a forged document (the Swanson letter) to the Court. The Court found, among other things, that Breedlove "had not made an objectively reasonable inquiry into the factual foundation of the letter before submitting it to the Court but had instead exhibited deliberate indifference to evidence that it was a forgery; and that plaintiff's affidavit, which alluded to the Swanson letter, had been submitted in bad faith in furtherance of a fraud upon the Court" (Order at 12.) The amount of the award was based upon defendants' reasonable expenses, including attorneys' fees and the expense of a handwriting expert, incurred in investigating the forgery and bringing a motion for a hearing on, the issue and as a result of the filing of plaintiff's affidavit.

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[1] The court of appeals decision in this case concerned only Rule 11 sanctions, but other cases have held that courts must consider ability to pay in determining sanctions based on other grounds as well. *See Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1337 (11th Cir. 2002) (sanctions under court's inherent power); *Byrne v. Nezhat*, 261 F.3d 1075, 1098-99 n.53 (11th Cir. 2001) (sanctions under Rule 11, 28 U.S.C. § 1927, and court's inherent power); *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 917 (11th Cir. 1982) (fee award to prevailing Title VII defendant under 42 U.S.C. § 2000e-5(k)).

In the same Order, the Court also granted defendants' request for imposition of additional sanctions on Starks and Breedlove based on their submission of a frivolous motion to stay. The motion sought additional time for Starks and Breedlove to retain a handwriting expert before the magistrate judge decided whether to impose sanctions in connection with the Swanson letter. Based upon the long delay during which Breedlove had ignored repeated notices that the Swanson letter was a forgery and had failed to undertake any investigation whatsoever, the Court found that the motion to stay "goes beyond being merely frivolous and borders on the contemptuous." (Order at 26.) Accordingly, the Court ordered Starks and Breedlove to reimburse defendants the amount of their expenses, including reasonable attorneys' fees, incurred in responding to the motion to stay. Defendants subsequently submitted evidence that such expenses totaled $43,890.83.

The Court also imposed additional sanctions on Starks and Breedlove based upon their submission with the motion to stay of an affidavit of Starks' daughter, April Robinson, which recanted a prior sworn statement and accused defendants' counsel of offering Robinson $15,000 to give false testimony against her mother. Defendants' counsel categorically denied the allegations, and the Court found them to be highly suspect for a number of reasons, including the affidavit's irregular form and inconsistencies between it and other established facts. The evidence indicated that, as with the Swanson letter, Breedlove had submitted the Robinson affidavit to the Court without any investigation of its truthfulness or authenticity. In light of the apparent falsity of the affidavit and the possibility that it was a fraudulently manufactured document, and viewing it together with the Swanson letter, which the

Court had already determined was a forgery, the Court concluded that the matter should be referred to the United States Attorney for the Northern District of Georgia, the Court's Committee on Discipline, and the State Disciplinary Board of the State Bar of Georgia for further investigation and possible prosecution or disciplinary action against Starks and/or Breedlove.

Starks and Breedlove filed separate appeals. During the pendency of the appeals, defendants filed a motion for an award of all attorneys' fees, costs, and expenses incurred in defending these action [sic], which they estimated to be approximately $390,000. On December 16, 2003, the court of appeals affirmed the Court's imposition of sanctions based on Starks' and Breedlove's submission of the Swanson letter.[2] However, the court vacated the amount of the award and remanded with directions to consider Starks' and Breedlove's ability to pay in determining the appropriate amount of sanctions.

Starks' and Breedlove's Financial Condition

On April 2, 2004, the Court ordered Starks and Breedlove each to file a sworn statement of their current financial condition, including a complete listing of their current income, assets, and liabilities. On May 5, 2004, Starks and Breedlove filed their respective affidavits, both asserting their inability to pay any sanctions.

According to Starks' affidavit, she is unemployed, lives with her 16-year-old daughter, and has a total household

[2] The court of appeals found that it lacked jurisdiction to review the award of sanctions for the frivolous motion to stay because this Court had not yet determined the appropriate amount of the award.

income of approximately $1,200 per month in Social Security benefits and total monthly expenses in excess of $1,500. In addition, Starks states that she has outstanding debts in excess of $15,000, which she has been unable to pay, and that her only assets are a 1992 automobile worth $405.

According to Breedlove's affidavit, he lives with his wife, who has not been employed since 1998, and has a total income of $3,920 per month from a Navy pension and his law practice.[3] The affidavit also states that Breedlove is employed eight months out of the year as an adjunct professor at Albany State University but provides no income amount for this employment. According to the affidavit, Breedlove has total monthly expenses in excess of $6,000, including a monthly mortgage payment of $2,834.16 on a new house purchased on January 16, 2004. The affidavit lists the outstanding mortgage balance as $399,182.35 but does not provide a total value for the house or the amount of Breedlove's equity in the house. The only other assets identified are two automobiles valued at $1,880 and $650, respectively,[4] and bank accounts totaling approximately $600. Finally, Breedlove states that he has expended in excess of $18,500 on the appeal in this case and in responding to the bar complaint initiated by this Court, and that he "simply is unable to pay any additional sanctions regardless of the amount" (Breedlove Aff. ¶ 12.)

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[3] Breedlove states that he has received no income from his law practice in 2004.

[4] The latter automobile is identified in the affidavit as a 1996 Toyota Camry, but the exhibit referenced is a copy of the Kelley Blue Book value for a 1986 Toyota Camry. This discrepancy is unexplained.

Following an opportunity to conduct discovery, defendants filed a memorandum of law regarding Starks' and Breedlove's ability to pay sanctions.[6] Defendants contend that Breedlove has the ability to pay sanctions. They cite tax records showing that the current fair market value of Breedlove's home is $650,000 and evidence that Breedlove represented to his lender that he and his wife were financially able to support a $400,000 mortgage. Breedlove refused to produce his actual mortgage application, but defendants cite a letter to Breedlove's mortgage lender from an employer stating that Breedlove's wife had accepted a position commencing July 7, 2003, at a starting salary of $40,000. Breedlove denies that his wife ever worked for the employer but apparently did not inform the mortgage lender of this fact prior to the closing. Defendants also cite tax records showing that, contrary to Breedlove's affidavit, his wife worked for the University of Georgia during 2003, earning $6,750, and that Breedlove failed to disclose over $8,000 in income he received from teaching at Albany State University. Tax records also show that Breedlove claimed $5,738 in charitable contributions by cash or check in 2003 and $12,905 in 2002, plus $6,500 in non-cash donations for a classic car he valued at $6,000 and $500 in clothing. Defendants also cite records showing that Breedlove's firm is counsel in approximately 45 cases that could produce income to Breedlove. Finally, defendants claim that Breedlove misled the Court in his affidavit by double-counting certain insurance expenses and by claiming expenses for the appeal which were paid to himself and his partner.

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[6] The Court grants defendants' motion for leave to file an amended memorandum to add testimony and cites from Breedlove's deposition.

In response,[6] Breedlove disputes defendants' characterization of his financial condition. He contends that the $650,000 tax appraisal of his house is in error because it is based on an overestimate of the square footage and the number of bathrooms in the house. An appeal of the appraisal is currently pending, but Breedlove offers no other evidence of the true fair market value of the house. Breedlove also contends that his wife's employment income was merely a stipend she received for teaching as part of her graduate studies and that she has not had full-time employment since 1998. Breedlove contends that he did not misrepresent his income from his own part-time employment at Albany State University because he was not teaching there at the time he filed his affidavit. Breedlove also denies that he double-counted any expenses in his affidavit.

Discussion

Before addressing the issue of Starks' and Breedlove's ability to pay any sanctions, the Court first addresses the two related matters noted above: (1) the amount of expenses, including attorneys' fees, reasonably incurred by defendants in responding to the motion to stay; and (2) whether defendants are entitled to an award of all attorneys' fees, costs, and expenses incurred in defending these actions.

As to the first issue, the Court has reviewed the affidavit and supporting documentation submitted by defendants' counsel setting forth a total of $43,890.83 in

[6] The Court grants Breedlove's motion for leave to respond to defendants' memorandum.

expenses, including attorneys' fees, incurred in responding to the motion to stay. The Court finds that this amount is reasonable and constitutes the appropriate amount of sanctions for Starks' and Breedlove's filing of the frivolous motion to stay.

As to the second issue, due to the totally frivolous nature of plaintiff's complaint, the Court concludes that defendants are entitled to an award of all their attorneys' fees, costs, and expenses incurred in defending this action. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). Defendants estimate this amount to be approximately $390,000. However, the Court finds it unnecessary to determine the precise amount of defendants' reasonable fees, costs, and expenses because the Court concludes that Starks and Breedlove are unable to pay any amount above the approximately $80,000 that is the sum of the fees and expenses incurred in connection with responding to the Swanson letter and the motion to stay ($35,145.75 + $43,890.83 = $79,036.58).

Although the Court has concluded that Starks and Breedlove do not have the ability to pay all the sanctions that would be justified in this case, the Court further concludes that they are able to pay some sanctions. The Court also concludes that, in light of the seriousness of the violations and their repeated nature, the Court should impose the maximum monetary sanction that Starks and Breedlove can realistically pay. Without the imposition of such monetary sanctions, the Court finds that Starks and

Breedlove will be neither punished for their past conduct nor deterred from engaging in such conduct in the future.

As to Starks, in light of her previous misrepresentations and her daughter's testimony that Starks conducts a lucrative practice advising individuals in need of quasi-legal advice (Sworn Statement of April Robinson at 33), the Court does not credit her affidavit claiming inability to pay. The Court finds that Starks is able to pay sanctions in the amount of $5,000.[7]

As to Breedlove, the Court finds that his affidavit does not accurately represent his financial condition. The affidavit fails to take into account the equity in Breedlove's home, which the evidence suggests is substantial.[8] In addition, Breedlove failed to account for his fee interest in some 45 pending lawsuits. Breedlove also failed to disclose his and his wife's income from part-time employment. Finally, Breedlove's substantial charitable contributions during the last two years belie his claim that he is unable to pay any sanctions. The Court concludes that Breedlove has the ability to pay sanctions in the total amount [sic] $79,036.58, which is the sum of the fees and expenses reasonably incurred by defendants in responding to the forged Swanson letter and the frivolous motion to stay.

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[7] Recognizing that Starks' current whereabouts are unknown and that defendants are unlikely to be able to collect any amount from her, the Court imposes this award for punitive purposes and not in an effort to compensate defendants.

[8] Although Breedlove disputes the current tax appraisal, the evidence shows that he purchased the land in 1998 and then constructed the house in 2003 using a construction loan of $400,000. Clearly, the land and house together are worth substantially more than the cost of construction.

Because of the disparity between Starks' and Breedlove's ability to pay, monetary sanctions shall be levied against each of them individually rather than jointly and severally. There being no evidence of any involvement in the misconduct by Breedlove's partner, Jule Lassiter, neither he nor the partnership shall be jointly responsible for the sanctions imposed on Breedlove. The sanctions shall be due and payable immediately. Final judgments shall be entered accordingly with direction that writs of execution issue immediately.

Finally, because Starks and Breedlove are unable to pay anywhere near the entire amount reasonably owed to defendants as sanctions,[9] the Court concludes that non-monetary sanctions are appropriate as a further punishment and deterrent. As to Breedlove, the Court finds that an appropriate non-monetary sanction is a public reprimand and this order shall serve as that reprimand. To publicize the reprimand, Breedlove shall be required to provide a copy of this order to all courts and opposing counsel in all cases he currently has pending or which he files within 12 months of the date of entry of this order. Finally, within 12 months of the date of entry of this order, Breedlove shall complete 12 hours of continuing legal education courses in the field of ethics over and above the continuing legal education requirements imposed by the State Bar of Georgia.

As to Starks, the Court finds that an appropriate non-monetary sanction is personal letters of apology to

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[9] In addition to the amounts awarded, defendants expended some $390,000 in defending this totally frivolous lawsuit, none of which they will ever recover.

defendants and their counsel. Within 30 days of the date of entry of this order, Starks shall prepare and send letters of apology to the law firm of McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC, Elaine Swanson, and the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. The form of the letter maybe of plaintiff's choosing but must include an express apology for the unnecessary trouble and expense caused by her frivolous lawsuit and for the false allegations leveled against Ogletree, Deakins' late partner, Martha Perrin. Copies of each letter together with a certificate of mailing shall be filed with the Court to demonstrate compliance with this order. Finally, in the event that Starks files any lawsuits against any party in the future, she shall notify the court in which the case is filed and the opposing party or parties of the sanctions awarded against her in this case by providing them with a copy of this order.

Summary

The Court GRANTS defendants' motion for award of attorneys' fees, costs, and expenses [#70-1, #70-2 in Civil Action No. 1:01-cv-1414-MHS; #67-1, #67-2 in Civil Action No. 1:01-cv-1749-MHS]; GRANTS defendants' motion for leave to file amended memorandum of law regarding ability of plaintiff and plaintiff's counsel to pay sanctions [#105-1 in Civil Action No. 1:01-cv-1414-MHS]; GRANTS Levi Breedlove's motion for leave to respond to defendants' memorandum of law and amended memorandum of law regarding ability of plaintiff and plaintiff's counsel to pay sanctions [#107-1 in Civil Action No. 1:01-cv-1414-MHS].

The Court AWARDS defendants sanctions against plaintiff Queen Starks, individually, in the amount of

$5,000; and against plaintiff's counsel, Levi Breedlove, individually, in the amount of $79,036.58. The Court DIRECTS the Clerk to enter final judgments in favor of defendants and against Queen Starks and Levi Breedlove in the foregoing amounts and DIRECTS that writs of execution on the judgments issue immediately.

The Court also REPRIMANDS Levi Breedlove for his conduct in this case and ORDERS him (1) to provide a copy of this order to all courts and opposing counsel in all cases he currently has pending or which he files within 12 months of the date of entry of this order; and (2) within 12 months of the date of entry of this order, to complete 12 hours of continuing legal education courses in the field of ethics over and above the continuing legal education requirements imposed by the State Bar of Georgia.

The Court ORDERS Queen Starks (1) within 30 days of the date of entry of this order, to prepare and send letters of apology to the law firm of McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC, Elaine Swanson, and the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., expressly apologizing for the unnecessary trouble and expense caused by her frivolous lawsuit and for the false allegations leveled against Ogletree, Deakins' late partner, Martha Perrin, and to file a copy of each letter together with a certificate of mailing with the Court; and (2) in the event that she files any lawsuits against any party in the future, to notify the court in which the case is filed and the opposing party or parties of the sanctions awarded against her in this case by providing them with a copy of this order.

IT IS SO ORDERED, this 30th day of September, 2004.

/s/ [Illegible]
Marvin H. Shoob,
Senior Judge
United States District Court
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, et al., Defendants.	:	CIVIL ACTION 1:01-CV-1414-MHS
QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, Defendant.	:	CIVIL ACTION 1:01-CV-1749-MHS

ORDER

(Filed Jun. 30, 2004)

The Court GRANTS defendants' request for an additional 45 days to complete discovery regarding the ability of plaintiff and plaintiff's former counsel to pay sanctions [#98-1]. Accordingly, defendants shall complete discovery and submit their recommendation to the Court by August 11, 2004.

IT IS SO ORDERED, this 29 day of June, 2004.

/s/ [Illegible]
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, et al., Defendants.	:	CIVIL ACTION 1:01-CV-1414-MHS
QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, Defendant.	:	CIVIL ACTION 1:01-CV-1749-MHS

ORDER

(Filed May 25, 2004)

These consolidated cases are before the Court on the affidavits of financial condition submitted by plaintiff Queen Starks and her former attorney, Levi Breedlove, pursuant to the Courts Order of April 2, 2004. In accordance with the direction of the court of appeals, the Court must consider Starks' and Breedlove's ability to pay in determining the appropriate amount of sanctions to impose for their submission of a fraudulent letter to the

Court.[1] In addition, the Court must consider Starks' and Breedlove's ability to pay before imposing any additional amount of sanctions in connection with their filing of a frivolous motion to stay[2] and defendants' motion for an award of attorney's fees and expenses incurred in defending these actions.[3]

After reviewing the affidavits, it appears to the Court that neither Starks nor Breedlove has the ability to pay any sanctions at all. Before making a final determination, however, the Court will give defendants the opportunity to be heard on the appropriate amount of sanctions, if any, that the Court should impose, taking into account Starks' and Breedlove's ability to pay. If defendants desire, they will be permitted to conduct whatever reasonable discovery they may deem necessary prior to making their recommendation to the Court.

Accordingly, the Court ORDERS defendants to conduct whatever discovery they deem necessary and to submit their recommendation to the Court within thirty (30) days of the date entry of this order.[4] The Court DIRECTS the Clerk to

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[1] The Court originally awarded sanctions in the amount $35,145.75, which was the amount of attorneys' fees and expenses incurred by defendants in investigating the forgery and bringing a motion for a hearing on the issue.

[2] Defendants have submitted an affidavit and supporting documentation showing that they incurred fees and expenses of $43,890.83 in responding to the motion.

[3] Defendants estimate their fees and expenses incurred in defending these actions to be approximately $390,000.

[4] If defendants need more time to complete discovery and make their submission, the Court will grant a request for reasonable additional time.

resubmit this action after the expiration of thirty (30) days.

IT IS SO ORDERED, this 25 day of May, 2004.

/s/ [Illegible]
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, et al., Defendants.	:	CIVIL ACTION 1:01-CV-1414-MHS
QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, Defendant.	:	CIVIL ACTION 1:01-CV-1749-MHS

ORDER

(Filed Apr. 2, 2004)

These consolidated cases are before the Court on remand from the Eleventh Circuit. In separate appeals, the court of appeals affirmed this Court's imposition of sanctions upon plaintiff Queen Starks and her former attorney, Levi Breedlove, jointly and severally, for the submission of a fraudulent letter.[1] However, the court vacated the amount of the award and remanded with

[1] The court also affirmed this Court's grant of summary judgment to defendants on plaintiff's Title VII claims.

directions to consider Starks' and Breedlove's ability to pay in determining the appropriate amount of sanctions.[2]

Also pending before the Court are two other related matters that were not addressed in the appeals. First is the amount of attorney's fees and expenses to be imposed upon Starks and Breedlove as sanctions for the filing of a frivolous motion to stay. Defendants have submitted an affidavit and supporting documentation showing that they incurred fees and expenses of $43,890.83 in responding to the motion. Second is defendants' motion for an award of attorney's fees, costs, and expenses incurred in defending these actions, which defendants estimate to be approximately $390,000.00. In light of the court of appeals' decision regarding the first sanctions award, as well as other Eleventh Circuit precedent, it is clear that the Court must consider Starks' and Breedlove's ability to pay before imposing any additional amount of sanctions in connection with either of these other two requests.[3]

Accordingly, within 30 days of the date of entry of this order, the Court ORDERS Starks and Breedlove each to file with the Court a sworn statement of their current

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[2] The Court originally awarded sanctions in the amount $35,145.75, which was the amount of attorneys' fees and expenses incurred by defendants in investigating the forgery and bringing a motion for a hearing on the issue.

[3] The court of appeals' decision in this case concerned only Rule 11 sanctions, but other cases have held that courts must consider ability to pay in determining sanctions based on other grounds as well. *See Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1337 (11th Cir. 2002) (sanctions under court's inherent power); *Byrne v. Nezhat*, 261 F.3d 1075, 1098-99 n.53 (11th Cir. 2001) (sanctions under Rule 11, 28 U.S.C. § 1927, and court's inherent power); *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 917 (11th Cir. 1982) (fee award to prevailing Title VII defendant under 42 U.S.C. § 2000e-5(k)).

financial condition, including a complete listing of their current income, assets, and liabilities. After considering these submissions, the Court will determine the appropriate amount of sanctions to be imposed.

IT IS SO ORDERED, this 2 day of April, 2004.

/s/ [Illegible]
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12318
Non-Argument Calendar

D.C. Docket No. 01-01414-CV-MHS-1

LEVI BREEDLOVE,

Movant-Appellant,

QUEEN STARKS,

Plaintiff,

versus

MCCALLA, RAYMER, PADRICK, COBB,
NICHOLS & CLARK, LLC,
PENNI A. ALPER,
in official capacity and personally, et al.,

Defendants-Appellees.

D.C. Docket No. 01-01749-CV-MHS

LEVI BREEDLOVE,

Movant-Appellant,

QUEEN STARKS,

Plaintiff,

versus

MCCALLA, RAYMER, PADRICK, COBB,
NICHOLS & CLARK, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed December 16, 2003)

Before BLACK, CARNES and HULL, Circuit Judges.

PER CURIAM:

Levi Breedlove, former attorney for Queen Starks in a race discrimination case, appeals the district court's: (1) grant of summary judgment to McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C., and various employees also named as defendants (McCalla),[1] (2) imposition of sanctions against him in the amount of $35,145.75, and (3) award of additional sanctions against him for the frivolous filing of a motion to stay.[2]

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[1] Breedlove no longer represents Starks. Because he has a contingency contract with Starks, he asserts he has an economic interest and "might" have a legal interest in Starks' underlying claims. We held an attorney with a contingency contract lacks standing to appeal the denial of his client's suit. *Smith v. South Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978). Breedlove lacks standing to challenge the district court's order granting summary judgment to McCalla.

[2] Breedlove claims the district court erred by granting additional sanctions for filing a motion to stay the order imposing the previous sanctions. We may only review a district court's final decision. *Mekdeci By and Through Mekdeci v. Merrell Nat. Labs., a Div. of Richardson-Merrell, Inc.*, 711 F.2d 1510, 1523 (11th Cir. 1983). A district court's decision to award costs, pursuant to Fed. R. Civ. P. 54(d), is not appealable where the district court has not determined the amount. *Id*

Moreover, an award of attorney's fees, pursuant to Fed. R. Civ. P. 37(d) is not appealable until the amount of the fees has been determined. *Jaffe v. Sundowner Props., Inc.*, 808 F.2d 1425, 1426 (11th Cir.

(Continued on following page)

The district court *sua sponte* imposed sanctions in the amount of $35,145.75, under Federal Rule of Civil Procedure 11, against Breedlove and Starks jointly and severally for the submission of a fraudulent letter into the record. Breedlove and Starks have filed separate appeals.

We review a district court's imposition of sanctions under Rule 11 for an abuse of discretion *Baker v. Alderman*, 158 F.3d 516, 521 (11th Cir. 1998). An attorney filing a pleading or other document with a court certifies the factual assertions have evidentiary support, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances." Fed. R. Civ. P. 11(b). The district court is empowered to "impose an appropriate sanction upon the attorneys, law firms or parties" violating this requirement. Fed. R. Civ. P. 11(c). An objective standard of reasonableness under the circumstances governs whether Rule 11 has been violated. *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993).

We have found *sua sponte* Rule 11 sanctions require more stringent review than normal. *Kaplan v. Daimler-Chrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. 2003). Court initiated-sanctions under Rule 11(c)(1)(B) do not involve the safe harbor provision giving a lawyer or litigant 21 days within which to correct or withdraw a challenged submission. "Because 'no "safe harbor" opportunity exists to withdraw or correct a submission challenged in a court-initiated proceeding,' Rule 11's drafters commented on Rule 11(c)(1)(B)'s compensating protections: The initiating

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1987). The district court has not yet determined the amount of sanctions for the submission of a frivolous motion to stay, and we lack jurisdiction to examine the appropriateness of such sanctions.

court must employ (1) a 'show-cause' order to provide notice and an opportunity to be heard; and (2) a higher standard ('akin to contempt') than in the case of party-initiated sanctions." *Id.* "While formal compliance with Rule 11(c)(1)(B) is the ideal, we apply a flexible standard, so in many cases substantial compliance may suffice." *Id.* at 1257 (internal citations omitted).

Under Rule 11, a "sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2). The court must consider the financial ability of the sanctioned party in the award of sanctions. *Baker,* 158 F.3d at 529. Deterrence remains the primary aim of Rule 11 sanctions, and the court must explain why the amount of sanctions will deter unreasonable conduct. *Id.* at 528. "A sanction which a party clearly cannot pay does not vindicate the court's authority because it neither punishes or deters." *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1337 (11th Cir. 2002). Joint and several liability requires the court consider the sanctioned party's individual ability to pay the entire judgment. *Id.*

The district court did not abuse its discretion in finding Breedlove violated Rule 11. Breedlove submitted a letter which McCalla had previously challenged as a forgery. Moreover, following McCalla's filing of a document contesting the authenticity of the letter, Breedlove resubmitted the letter in another pleading. Breedlove failed to conduct an inquiry or otherwise verify the authenticity of the letter prior to the hearing regarding

possible sanctions. Given that Breedlove (1) twice failed to conduct any investigation into the authenticity of the contested letter before submitting it in pleadings, and (2) declined to conduct any investigation prior to the sanctions hearing, Breedlove violated Rule 11. It was unreasonable for Breedlove not to conduct any investigation into the letter given its questionable nature. *See Didie*, 988 F.2d at 1104.

Breedlove cites *In re Pennie & Edmonds LLP*, 323 F.3d 86, 91 (2d Cir. 2003), for his claim the district court erred by sanctioning him without first finding he had acted in bad faith. *Pennie*, however, which is not binding on this Court, was a narrow opinion only affecting cases where the sanctioned party had no opportunity to withdraw or correct a faulty submission, unlike here where Breedlove was sanctioned for his second submission of a challenged letter without first conducting any investigation into its authenticity. *See Kaplan*, 331 F.3d at 1255-56; *Pennie*, 323 F.3d at 91-92. Furthermore, we have not held the district court must find bad faith in order to impose sanctions. *See Kaplan*, 331 F.3d at 1256.

Breedlove also argues he should not be sanctioned because he was representing his client zealously. Breedlove presents no evidence showing an attorney's duty to his client allows him to violate Rule 11 with impunity. More importantly, Breedlove never argued he relied on assurances of his client for the letter's validity. In fact, the evidence does not establish Breedlove even questioned Starks regarding the authenticity of the letter.

Breedlove further contends the district court erred by not holding an evidentiary hearing and erroneously finding he had committed a fraud on the court. Breedlove

was sanctioned for violations of Rule 11, not committing a fraud on the court. Additionally, Breedlove's argument the district court failed to conduct an evidentiary hearing is without merit as Breedlove did not seek to present any evidence in his defense or otherwise show he had conducted an investigation into the authenticity of the letter.

Breedlove complains the district court failed to issue a formal show cause order prior to holding a hearing regarding sanctions. The magistrate issued an order on December 11, 2002, setting a hearing for January 9, 2003, "[p]ursuant to Defendant's request for a hearing on Rule 56(g) and for potential violations of Rule 11(b). . . . " This order satisfied the requirements of Rule 11, as it "substantially complied" with the requirements of Rule 11(c)(1)(B). *See Kaplan*, 331 F.3d at 1257. Additionally, although Breedlove contends the district court lacked the power to *sua sponte* award sanctions to McCalla, we have affirmed the award of sanctions to parties under Rule 11, even though the issue of sanctions was raised *sua sponte*. *See, eg., Aetna Ins. Co. v. Meeker*, 953 F.2d 1328, 1334 (11th Cir. 1992).

Inregard to the amount of sanctions, however, the district court failed to consider Breedlove's financial state prior to determining the proper amount of sanctions. *See Baker*, 158 F.3d at 529. Breedlove is liable for the entire amount of sanctions because the sanctions amount was joint and several. *See Martin*, 307 F.3d at 1337. Accordingly, the district court abused its discretion by imposing in excess of $35,000 in sanctions without first examining Breedlove's financial status.

For the foregoing reasons, the imposition of sanctions upon Breedlove for the submission of a fraudulent letter is

affirmed, but the amount is vacated and remanded for the district court to consider Breedlove's ability to pay.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

United States Court of Appeals
For the Eleventh Circuit

No. 03-11948

District Court Docket No.
01-01414-CV-MHS-1
01-01749-CV-MHS

1:01-CV-1414MHS
QUEEN STARKS,

Plaintiff-Appellant,

versus

MCCALLA, RAYMER, PADRICK,
COBB, NICHOLS & CLARK, LLC,
PENNI A. ALPER,
in official capacity and personally,
CHRISSA HAMMOND,
in official capacity and personally,

Defendants-Appellees,

1:01-CV-1749MHS

QUEEN STARKS,

Plaintiff-Appellant,

versus

MCCALLA, RAYMER, PADRICK,
COBB, NICHOLS & CLARK, LLC,

Defendant-Appellee,

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

(Filed Dec. 16, 2003)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: December 16, 2003
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11948
Non-Argument Calendar

D.C. Docket No. 01-01414-CV-MHS-1

QUEEN STARKS,

Plaintiff-Appellant,

versus

MCCALLA, RAYMER, PADRICK,
COBB, NICHOLS & CLARK, LLC,
PENNI A. ALPER,
in official capacity and personally, et al.,

Defendants-Appellees.

D.C. Docket No. 01-01749-CV-MHS

QUEEN STARKS,

Plaintiff-Appellant,

versus

MCCALLA, RAYMER, PADRICK,
COBB, NICHOLS & CLARK, LLC,

Defendants-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed December 16, 2003)

Before BLACK, CARNES and HULL, Circuit Judges.

PER CURIAM:

Queen Starks appeals the district court's: (1) grant of summary judgment to McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., and various employees also named as defendants (McCalla), in her race discrimination suit, (2) imposition of sanctions against her in the amount of $35,145.75, and (3) award of additional sanctions against her for the frivolous filing of a motion to stay.[1]

I.

Starks first argues the district court erred by granting summary judgment on, her Title VII claims. The magistrate issued a report and recommendation, finding, *inter alia*, McCalla should be granted summary judgment and Starks should pay sanctions to McCalla. Starks objected to the report and recommendation, primarily alleging error in the district court's award of sanctions to McCalla, but did not challenge the magistrate's finding that McCalla

[1] Starks claims the district court erred by granting additional sanctions for filing a motion to stay the order imposing the previous sanctions. We may only review a district court's final decision. *Mekdeci By and Through Mekdeci v. Merrell Nat. Labs., a Div. of Richardson-Merrell, Inc.*, 711 F.2d 1510, 1523 (11th Cir. 1983). A district court's decision to award costs, pursuant to Fed. R. Civ. P. 54(d), is not appealable where the district court has not determined the amount. *Id.* Moreover, an award of attorney's fees, pursuant to Fed. R. Civ. P. 37(d) is not appealable until the amount of the fees has been determined. *Jaffe v. Sundowner Props., Inc.*, 808 F.2d 1425, 1426 (11th Cir. 1987). The district court has not yet determined the amount of sanctions for the submission of a frivolous motion to stay, and we lack jurisdiction to examine the appropriateness of such sanctions.

was entitled to summary judgment. When a magistrate determines a non-dispositive issue, a party has 10 days to file any objections and a party may not assert error if she did not make a timely objection. Fed. R. Civ. P. 72(a); A claim of error in an issue determined by a magistrate is waived if the complaining party did not object to the magistrate's ruling in the district court. *Farrow v. West*, 320 F.3d 1235, 1248-49 n.21 (11th Cir. 2003). Starks failed to object to the magistrate's recommendation that summary judgment be granted, and therefore, waived any objection to the district court's grant of summary judgment.[2]

II.

Next, Starks argues the district court abused its discretion by *sua sponte* imposing sanctions in the amount of $35,145.75, under Federal Rule of Civil Procedure 11, against her and her former attorney Levi Breedlove, jointly and severally, for the submission of a fraudulent letter into the record.

We review a district court's imposition of sanctions under Rule 11 for an abuse of discretion. *Baker v. Alderman*, 158 F.3d 516, 521 (11th Cir. 1998). An attorney filing a pleading or other document with a court certifies the

[2] To the extent Starks argues she was unaware that she should appeal the magistrate's order, Starks, through counsel, objected to the magistrate's report and, therefore, understood the need to object. Moreover, although she claims the large amount of sanctions assessed against her clouded her judgment, her argument is belied by the fact the magistrate did not specify an amount of sanctions. Accordingly, Starks has waived all review of the district court's grant of summary judgment to McCalla. See Fed. R. Civ. P. 72(a); *Farrow*, 320 F.3d at 1248-49 n.21.

factual assertions have evidentiary support "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances." Fed. R. Civ. P. 11(b). The district court is empowered "to impose an appropriate sanction upon the attorneys, law firms, or parties" violating this requirement. Fed. R. Civ. P. 11(c). Rule 11 sanctions may be levied against a party, even if the party is represented by an attorney and the party did not sign the pleadings in question. *Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001). An objective standard of reasonableness under the circumstances governs whether Rule 11 has been violated. *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993).

We have found *sua sponte* Rule 11 sanctions require more stringent review than normal. *Kaplan v. Daimler-Chysler, A. G.*, 331 F.3d 1251, 1255-56 (11th Cir. 2003). Court initiated-sanctions under Rule 11(c)(1)(B) do not involve the safe harbor provision giving a lawyer or litigant 21 days within which to correct or withdraw a challenged submission. "Because 'no "safe harbor" opportunity exists to withdraw or correct a submission challenged in a court-initiated proceeding,' Rule 11's drafters commented on Rule 11(c)(1)(B)'s compensating protections: The initiating court must employ (1) a 'show-cause' order to provide notice and an opportunity to be heard; and (2) a higher standard ('akin to contempt') than in the case of party-initiated sanctions." *Id.* at 1255. "While formal compliance with Rule 11(c)(1)(B) is the ideal, we apply a flexible standard, so in many cases substantial compliance may suffice." *Id.* at 1257.

Under Rule 11, a "sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted

for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2). The court must consider the financial ability of the sanctioned party in the award of sanctions. *Baker*, 158 F.3d at 529. Deterrence remains the primary aim of Rule 11 sanctions, and the court must explain why the amount of sanctions will deter unreasonable conduct. *Id.* at 528. "A sanction which a party clearly cannot pay does not vindicate the court's authority because it neither punishes or deters." *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1337 (11th Cir. 2002). Joint and several liability requires the court consider the sanctioned party's ability to pay the entire judgment. *Id.*

The district court did not abuse its discretion by finding Starks violated Rule 11. Starks submitted a letter which McCalla had previously challenged as a forgery. Moreover, following McCalla's filing of a document contesting the authenticity of the letter, Starks resubmitted the letter in another pleading. Starks also failed to conduct an inquiry or otherwise verify the authenticity of the letter prior to the hearing regarding possible sanctions. Given that Starks (1) twice failed to conduct any investigation into the authenticity so the contested letter before submitting it in pleadings, and (2) declined to conduct any investigation prior to the sanctions hearing, Starks violated Rule 11. It was unreasonable for Starks not to conduct any investigation into the letter given its questionable nature.

Starks cites *In re Pennie & Edmonds LLP*, 323 F.3d 86, 91 (2d Cir. 2003), for her claim the district court erred by sanctioning her without first finding she acted in bad faith. *Pennie*, however, which is not binding on this Court,

was a narrow opinion only affecting cases where the sanctioned party had no opportunity to withdraw or correct a faulty submission, unlike here where Starks was sanctioned for the second submission of a challenged letter without first conducting any investigation into its authenticity. *See Kaplan*, 331 F.3d at 1255-56; *Pennie*, 323 F.3d at 91-92. Furthermore, we have not held the district court must find bad faith in order to impose sanctions. *See Kaplan*, 331 F.3d at 1256.

Starks also complains the district court failed to issue a formal show cause order prior to holding a hearing regarding sanctions. The magistrate issued an order on December 11, 2002, setting a hearing for January 9, 2003, "[p]ursuant to Defendant's request for a hearing on Rule 56(g) and for potential violations of Rule11(b). . . . " This order satisfied the requirements of Rule 11, as it "substantially complied" with the requirements of Rule 11(c)(1)(B). *See Kaplan*, 331 F.3d at 1257. Additionally, although Starks contends the district court lacked the power to *sua sponte* award sanctions to McCalla, we have affirmed the award of sanctions to parties under Rule 11, even though the issue of sanctions was raised *sua sponte*. *See, e.g., Aetna Ins. Co. v. Meeker*, 953 F.2d 1328, 1334 (11th Cir. 1992).

Starks also argues the magistrate improperly held a hearing on the trial evidence. The district court is authorized to refer an action to the magistrate to (1) determine pretrial matters, and (2) conduct hearings on matters, including evidentiary matters and make reports and recommendations to the district court. 28 U.S.C. § 636(b)(1). The hearing was a sanctions hearing and did not weigh or otherwise address trial issues. The magistrate did not exceed the scope of its authority.

In regard to the amount of sanctions, however, the district court failed to consider Starks' financial state prior to determining the proper amount of sanctions. *See Baker*, 158 F.3d at 529. Although Starks' *in forma pauperis* status does not preclude the grant of sanctions, sanctions must be capable of being repaid in order to be effective. *See Martin*, 307 F.3d at 1337; *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989). Starks is liable for the entire amount of sanctions because the sanctions amount was joint and several. *See Martin*, 307 F.3d at 1337. Accordingly, the district court abused its discretion by imposing in excess of $35,000 in sanctions without first examining Starks' financial status.

For the foregoing reasons, the imposition of sanctions upon Starks for the submission of a fraudulent letter is affirmed, but the amount is vacated and remanded for the district court to consider Starks' ability to pay.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	1:01-CV-1414-MHS
MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, et al.,	:	
Defendants.	:	
QUEEN STARKS,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	1:01-CV-1749-MHS
MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK,	:	
Defendant.	:	

ORDER

(Filed May 29, 2003)

These consolidated Title VII actions are before the Court on plaintiff's request for a Rule 60 hearing and plaintiff's motion for leave to take depositions of witnesses. For the following reasons, the Court denies both motions.[1]

[1] Also pending are two matters relating to attorney's fees and expenses. First, the Court ordered plaintiff and her counsel to pay defendants' expenses, including reasonable attorney's fees, incurred in responding to plaintiff's motion to stay. Defendants have submitted an

(Continued on following page)

Background

On March 27, 2003, the Court entered an Order adopting the Magistrate Judge's Report and Recommendation (R&R) and granting defendants' motion for summary judgment. In addition, based on plaintiffs and her counsel's submission of an apparently forged letter to the Court, as well as a highly suspect affidavit of plaintiff's daughter, April Robinson, which accused defense counsel of bribery and suborning perjury, the Court imposed sanctions on both plaintiff and her counsel and referred the matter to the U.S. Attorney, the State Bar of Georgia, and this Court's Committee on Discipline for further investigation and possible disciplinary action and/or prosecution. Final judgment was entered on March 28, 2003. On April 7 and April 28, 2003, respectively, plaintiff and her counsel each filed separate a notice of appeal.

Meanwhile, on April 11, 2003, defendants filed a motion for an award of attorney's fees, costs, and expenses incurred in defending these actions pursuant to the provision for such awards to prevailing parties in Title VII actions, 42 U.S.C. § 2000e-5(k), as well as 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure. On April 28, 2003, plaintiff responded to the motion. At the conclusion of her response, plaintiff included a brief request for what she characterized as a "Rule 60 hearing." Plaintiff stated that at the hearing she would present

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affidavit claiming a total of $43,890.83 in fees and expenses were incurred in responding to the motion, and plaintiff has filed objections to that amount. Second, defendants have filed a motion for an award of attorney's fees, costs, and expenses incurred in defending these actions, and plaintiff opposes the motion. The Court will address these matters in a forthcoming order.

evidence supporting the setting aside of the judgment, as well as evidence of her financial condition. In addition, plaintiff sought to submit the testimony of April Robinson regarding her previous sworn statement and subsequent affidavit, and evidence regarding the Swanson letter that the Magistrate Judge found to have been forged.

On May 21, 2003, plaintiff filed a motion pursuant to Fed. R. Civ. P. 27(b) for leave to take depositions of witnesses in connection with her pending request for a Rule 60 hearing. Specifically, plaintiff sought leave to depose April Robinson and Arthur T. Anthony, defendant's handwriting expert, "to perpetuate their testimony for use in further proceedings in the district court." Plaintiff attached to her motion a copy of a subpoena directed to April Robinson and a notice of deposition scheduling the deposition for May 29, 2003. Plaintiff stated that Ms. Robinson planned to move out of the state on May 30, 2003. In light of plaintiff's reported intention to proceed with the Robinson deposition even though this Court has not yet ruled on her motion for leave to take the deposition, the Court orally informed counsel on May 28, 2003, that the deposition should not proceed until this Court had ruled on the pending motion.

Discussion

Rule 27(b) of the Federal Rules of Civil Procedure provides that the Court "may" allow the perpetuation of testimony pending appeal where it is "proper to avoid a failure or delay of justice." Rule 27, however, "is not a substitute for discovery. It is available in special circumstances to preserve testimony which could otherwise be lost." *Ash v. Cort*, 512 F.2d 909, 912 (3d Cir. 1975). Here,

plaintiff has failed to make the showing required to support an order that she be allowed to take the requested depositions.

First, plaintiff contends that the testimony of these witnesses is needed in connection with her request for a Rule 60 hearing. Plaintiff, however, has filed no motion for relief under Rule 60 of the Federal Rules of Civil Procedure, nor does her request for a hearing identify any grounds for relief under Rule 60.[2] Therefore, there is no basis for the Court to hold a Rule 60 hearing and thus no need for the requested testimony.

Second, plaintiff and her counsel seek to obtain the testimony of these witnesses in order to respond to allegations that the Swanson letter was forged and that the April Robinson affidavit was false and may have been fabricated. These issues, however, are no longer before this Court. The only proceedings where such evidence might arguably be relevant are the disciplinary and/or criminal proceedings that may be initiated by the U.S. Attorney, the State Bar, or this Court's Committee on Discipline. If

[2] Plaintiff's counsel argues that he had no notice or opportunity to be heard on the issue of sanctions in connection with the Swanson letter. To the contrary, on September 16, 2002, defendants filed and served on plaintiff's counsel a request for a hearing before the Magistrate Judge to discuss "inappropriate conduct by plaintiff." Attached to the request was the affidavit of handwriting expert Arthur Anthony attesting that the Swanson letter was a forgery. On December 11, 2002, the Magistrate Judge notified counsel that she would consider the matter, *including the possible imposition of Rule 11 sanctions*, at a hearing to be held on January 9, 2003. Order filed December 13, 2002. Despite this notice, plaintiff's counsel made no effort to depose Mr. Anthony and took no other action to conduct his own inquiry into the authenticity of the Swanson letter. His argument now that he had no notice or opportunity to be heard is disingenuous at best.

plaintiff or her counsel wish to obtain evidence for presentation in those proceedings, they should seek leave from the U.S. Attorney, the State Bar, or the Committee on Discipline, as appropriate.

Finally, plaintiff has failed to show that the testimony of these witnesses could be lost if not preserved now. Plaintiff makes no effort to argue that the testimony of Mr. Anthony could be lost. As for Ms. Robinson, plaintiff merely states that she plans to move out of state tomorrow. This claim, however, is not supported in any way, by affidavit or otherwise. Furthermore, even if true, this would not mean that Ms. Robinson's testimony would be lost but merely that it might be somewhat more difficult to obtain. This is not sufficient to justify allowing plaintiff to take the deposition now.

Summary

For the foregoing reasons, the Court DENIES plaintiff's request for a Rule 60 hearing [#74-1 in Civil Acton [sic] No. 1:01-CV-1414-MHS; #72-1 in Civil Action No. 1:01-CV-1749-MHS] and DENIES plaintiff's motion for leave to take depositions of witnesses [#79-1 in Civil Acton [sic] No. 1:01-CV-1414-MHS; #76-1 in Civil Action No. 1:01-CV-1749-MHS].

IT IS SO ORDERED, this 29 day of May, 2003.

/s/ [Illegible]
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, et al., Defendants.	:	CIVIL ACTION 1:01-CV-1414-MHS
QUEEN STARKS, Plaintiff, v. MCCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, Defendant.	:	CIVIL ACTION 1:01-CV-1749-MHS

ORDER

(Filed Mar. 27, 2003)

These consolidated actions asserting employment discrimination claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and related state law claims are before the Court on defendants' motion for summary judgment, the Magistrate Judge's Final Report and Recommendation (R&R) recommending that the motion be granted, and plaintiffs' objections to the R&R. Also before the Court are plaintiffs' objections to the Magistrate Judge's Order issued with the R&R, which (1) imposed Rule 11 sanctions on plaintiff

based on a finding that she had submitted a forged document to the Court and had submitted an affidavit in bad faith that relied in part on the forged document, (2) granted defendants' motion to strike plaintiff's statement of undisputed material facts and response to defendants' statement of material facts as to which there is no genuine issue to be tried, and (3) denied plaintiff's motion to strike defendants' motion for summary judgment. Finally, also before the Court are plaintiff's motion to stay order and defendants' motion to impose appropriate sanctions, direct proper referrals, and award other remedies as the Court sees fit.

For the following reasons, after a *de novo* review of the record, the Court concludes that the Magistrate Judge's Order and R&R are correct and that plaintiff's objections are without merit. Accordingly, the Court affirms the Order and adopts the R&R as the order of this Court, grants defendants' motion for summary judgment, and dismisses this action with prejudice. In addition, the Court denies as moot plaintiff's motion to stay order and grants defendants' motion to impose appropriate sanctions, direct proper referrals, and award other remedies as the Court sees fit. The Court will refer this matter to the United States Attorney's office, the Court's Committee on Discipline, and the State Disciplinary Board of the State Bar of Georgia for further investigation of the conduct of both plaintiff and her counsel.

I. Background

A. Plaintiff's Employment

In August 1999, plaintiff Queen Starks, an African-American woman, was employed by defendant law firm

McCalla, Raymer, Padrick, Cobb, Nichols & Clark (McCalla Raymer) as a loss mitigation specialist in its bankruptcy department. Plaintiff claims that after the firm learned in late 1999 that she had a law degree, her immediate supervisor told her to "find another job as we don't have any minority attorneys here." Plaintiff also claims that she was discriminated against on the basis of her race with respect to discipline, compensation, evaluations, training, and promotion; that she was subjected to a racially hostile work environment; and that she suffered retaliation due to her complaints about discrimination.

On March 16, 2000, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), asserting that she had been denied a transfer and other benefits because of her race. In May 2000, McCalla Raymer counseled plaintiff because a customer had allegedly complained that she had exhibited "rude and threatening" behavior. Plaintiff then accepted a transfer to a position as a paralegal. On September 29, 2000, plaintiff filed a second charge of discrimination with the EEOC, asserting that the written counseling and a March 2000 performance appraisal were in retaliation for her filing the initial charge.

On June 16, 2000, plaintiff allegedly suffered an on-the-job injury as the result of a fall. She did not return to work for more than eight months. Finally, she was released by her physician to return to work on February 26, 2001. On the day of her return, however, she allegedly suffered a second injury as a result of another fall and has not returned to work since.

B. Procedural History

On May 16, 2001, plaintiff filed an action in the State Court of Fulton County against McCalla Raymer and two of its employees, Penni A. Alper and Chrissa Hammond. The complaint asserted claims for defamation, fraud, conspiracy, intentional infliction of emotional distress, and breach of fiduciary duty. Plaintiff sought declaratory relief, $3,000,000 in compensatory damages, $7,000,000 in punitive damages, plus an award of attorney's fees pursuant to 42 U.S.C. § 1988.

On June 1, 2001, defendants removed the case to this Court (Civil Action No. 1:01-cv-1414-MHS) on the grounds that plaintiff's claims arose under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and thus involved questions of federal law over which this Court has original jurisdiction. Plaintiff moved to remand the action to state court on the grounds that all the claims asserted were purely matters of state law and presented no issues of federal law. Meanwhile, on June 14, 2001, plaintiff filed a Title VII complaint in this Court against McCalla Raymer (Civil Action No. 1:01-cv-1749-MHS). McCalla Raymer then moved to consolidate the removed action with the Title VII action. On January 14, 2002, the Court denied plaintiff's motion to remand and granted defendants' motion to consolidate the two cases.

C. The Swanson Letter

On May 22, 2002, one day after the close of discovery, plaintiff's attorney, Levi Breedlove, wrote to defendants' attorney, Martha Perrin, enclosing a copy of a letter on McCalla Raymer letterhead dated January 22, 2001, purportedly from Elaine Swanson, McCalla Raymer's

office manager; to Dr. Donald Orr, plaintiff's treating physician. In the letter, Swanson tells Dr. Orr that if he will release plaintiff for work, Swanson will terminate her immediately if she fails to return to work or, if she does return, she "will find proper cause to terminate her for a non-injury related issue. . . ." Breedlove stated his intention to use this letter against defendants in support of plaintiff's claims of discrimination.

On May 30, 2002, Perrin wrote to Breedlove and informed him that she believed the Swanson letter was a forgery. According to Perrin, neither Dr. Orr nor his office manager had ever seen the letter and no original or copy of the letter could be found in Dr. Orr's files. Nor could a copy of the letter be found in the files of McCalla Raymer's worker's compensation attorneys, the insurance company, or the medical records submitted to the State Board of Worker's Compensation. Perrin informed Breedlove that her investigation of the authenticity of the Swanson letter would continue and would include examination of the letter by a handwriting expert. Perrin also told Breedlove that she would present him with affidavits and official reports before approaching the Court about the matter.

On June 28, 2002, despite the questions raised by defense counsel about the Swanson letter's authenticity, Breedlove submitted the letter to the Court in support of plaintiff's motion for leave to amend the complaint to add Swanson and Dr. Orr and another doctor as parties. In their response to the motion, defendants denied that the Swanson letter was authentic and informed the Court that they were conducting an investigation to establish that fact. Nevertheless, on September 3, 2002, plaintiff submitted the letter to the Court a second time, as an exhibit to her response to defendants' motion for summary judgment.

Plaintiff also alluded to the letter in her affidavit and relied on both the letter and her affidavit to support most of her undisputed material facts.

On September 16, 2002, defendants filed their reply in support of their summary judgment motion and requested a hearing before the Court "to discuss highly confidential and serious issues of inappropriate conduct by plaintiff." In support of their request, defendants stated that they had compelling evidence that plaintiff in her affidavit had "made factual assertions that she knew to be false in regard to the legitimacy of [the Swanson letter] and as to the legitimacy of her alleged on the job injuries." Attached to defendants' request was an affidavit by a handwriting expert attesting that the Swanson letter was a forgery, as well as affidavits by Dr. Orr, Dr. Orr's office manager, and McCalla Raymer's worker's compensation attorney, all attesting that no such letter could be found in their files. On December 13, 2002, the Magistrate Judge granted defendants' request for a hearing.

On January 9, 2003, the Magistrate Judge conducted an evidentiary hearing on defendants allegations regarding the Swanson letter. Plaintiff's counsel appeared at the hearing, but plaintiff did not. In addition to the affidavits previously submitted with their request for a hearing, defendants filed the affidavit of Elaine Swanson in which she attests that she did not write or sign the Swanson letter and that it was not prepared at her direction. Plaintiff's attorney presented no evidence. Instead, he claimed unfair surprise because defendants had not been more forthcoming with the results of their investigation. Yet, he admitted that despite prompt notice from defendants' counsel after his initial presentation of the letter that she believed the letter was a forgery, as well as

receipt of the affidavits attached to defendants' request for a hearing, including the handwriting expert's affidavit attesting that the Swanson letter was a forgery, he had not undertaken any investigation of his own to determine the letter's authenticity other than inquiring of plaintiff's previous worker's compensation attorneys if they had an additional copy of the letter.

D. The April Robinson Statement

At the January 9 evidentiary hearing, defendants' counsel also submitted the transcript of a sworn statement of April Robinson taken on August 30, 2002. According to defendants' counsel, Robinson telephoned her on August 23, 2002, said that she was the plaintiff's daughter, and that she wanted to talk to someone about her mother and her mother's claims before the Court. Counsel suggested that she contact the Magistrate Judge's office, but several days later Robinson called again and said she had called the Magistrate Judge's office and had been told they could not talk to her. Defendants' counsel then asked if she could contact plaintiff's counsel and invite him to participate in the discussion. Robinson stated that she would not come if plaintiff's counsel were there, because she was afraid he would tell her mother. Therefore, on August 30, 2002, defendants' counsel met with Robinson and had a court reporter take down her sworn testimony. Also present was McCalla Raymer's worker's compensation attorney.

Robinson testified that she was 25 years old and was giving her statement freely and voluntarily because she did not "want to lie anymore." She testified that plaintiff had purposely staged the two slip-and-fall accidents at McCalla Raymer's offices, and that the injuries she

claimed to have suffered were completely fraudulent. Robinson also testified that Tamara Starks, whom plaintiff had identified as a person who assisted her in preparing a number of documents, was actually a fictitious person who did not exist.

II. Plaintiff's Motion to Stay and Defendants' Response

On January 28, 2003, plaintiff filed a motion to stay order, in which she asked the Magistrate Judge to withhold any ruling on sanctions until she could obtain an independent expert to evaluate handwriting samples to determine the authenticity of the allegedly forged Swanson letter. In support of that motion, plaintiff submitted an affidavit purportedly executed by plaintiff's daughter, April Robinson, in which Robinson stated that she had lied in her prior sworn statement and that she had provided that false statement to defendants' counsel in return for counsel's promise to pay her $15,000.

In her response to plaintiff's motion, defendants' counsel unequivocally denied the accusation that she had bribed and suborned perjury from plaintiff's daughter. Defendants' counsel questioned both the authenticity and veracity of April Robinson's affidavit and asked the Court to impose the most severe sanctions on plaintiff's counsel for submitting to the Court such scurrilous and unsubstantiated charges apparently without making any attempt to determine whether they had any foundation in fact. Defendants also requested that the Court refer this matter to the State Bar of Georgia for consideration of possible disciplinary proceedings against plaintiff's counsel and to the United States Attorney's Office for investigation of possible criminal conduct.

III. The Magistrate Judge's Order and Final Report and Recommendation

On January 29, 2003, apparently unaware of the motion to stay order filed by plaintiff the previous day, the Magistrate Judge issued her Order and Final Report and Recommendation. Among other things, the Magistrate Judge found that the Swanson letter was a forgery; that plaintiff's counsel had not made an objectively reasonable inquiry into the factual foundation of the letter before submitting it to the Court but had instead exhibited deliberate indifference to evidence that it was forgery; and that plaintiff's affidavit, which alluded to the Swanson letter, had been submitted in bad faith in furtherance of a fraud upon the Court. The Court found that such conduct violated Rule 11(b) of the Federal Rules of Civil Procedure. As sanctions, the Magistrate Judge ordered that the Swanson letter and plaintiff's affidavit be stricken from the record and ordered plaintiff to pay defendants' reasonable expenses, including attorney's fees and the expense of a handwriting expert, resulting from having to investigate the forgery, as well as defendants' reasonable expenses, including attorney's fees, incurred in bringing a motion for a hearing on the issue and as a result of the filing of plaintiff's affidavit.[1]

The Magistrate Judge also recommended that this Court consider further Rule 11 sanctions against plaintiff and plaintiff's counsel due to the frivolous nature of the claims in this lawsuit and other potentially manufactured documents, and that the Court consider whether it might

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[1] In response to the Magistrate Judge's Order, defendants have submitted a listing, together with supporting affidavit and documentation, of the expenses and attorney's fees incurred, totaling $35,145.75.

be appropriate to forward this case to the United States Attorney's Office for investigation of possible criminal conduct. The Magistrate Judge specifically directed the Court's attention to April Robinson's sworn statement of August 30, 2002, in which Robinson testified that plaintiff had staged the two on-the-job accidents at McCalla Raymer and had then gotten Robinson to lie to her doctors about plaintiff's purported injuries.

The Magistrate Judge also ruled on several pending motions related to defendants' motion for summary judgment. First, the Magistrate Judge granted defendants' motion to strike plaintiff's statement of undisputed material facts. The Magistrate Judge found that the statement relied heavily on plaintiff's affidavit, which had already been stricken on the grounds that it contained false statements and was submitted in bad faith in furtherance of a fraud on the Court. In addition, the Magistrate Judge found that the affidavit did not support plaintiff's alleged undisputed facts and relied in large part on vague and conclusory statements.

Second, the Magistrate Judge granted defendants' motion to strike plaintiff's response to defendants' statement of undisputed material facts. The Magistrate Judge found that plaintiff's response was nonresponsive, because it attempted to deny facts by merely asserting that they were based on "self-serving affidavits and declarations" and suggesting what the "best evidence" in support of a particular fact would or should be. In addition, the Magistrate Judge noted that when plaintiff did dispute a fact by citation to the record, the portion of the record cited did not support plaintiff's contention.

Finally, the Magistrate Judge denied plaintiff's motion to strike defendants' motion for summary judgment. The Magistrate Judge rejected plaintiff's contention that the motion did not comply with the local rules because defendants' statement of material facts included more than "one sentence per number" and because defendants' memorandum of law contained citations to defendants' statement of material facts rather than direct citations to the record.

Turning to defendants' motion for summary judgment, the Magistrate Judge thoroughly examined each of plaintiff's claims and concluded that all were without merit. Specifically, the Magistrate Judge found that plaintiff had failed to make out a prima facie case of discriminatory failure to promote her to Human Resources Manager, because plaintiff was not qualified for the position, and McCalla Raymer had eliminated the position rather than leaving it open or filling it with someone who was not African-American. In addition, the Magistrate Judge found no evidence that McCalla Raymer's proffered legitimate business reason for eliminating the position was a pretext for race discrimination.

The Magistrate Judge also found that plaintiff had failed to make out a prima facie case of discriminatory failure to promote her to the positions of Bankruptcy Operations Manager and Bankruptcy Administrator, because she had not established that she was qualified for the positions, and one of the positions was actually filled by another African-American woman. In addition, the Magistrate Judge found no evidence of pretext because the two persons McCalla Raymer chose for these positions were substantially more qualified than plaintiff.

Plaintiff also asserted that McCalla Raymer discriminated against her on the basis of her race by denying her a transfer out of her unit, denying her a raise, and denying her an attorney mentor. The Magistrate Judge found no evidence to support these claims. To the contrary, the Magistrate Judge found that McCalla Raymer had presented undisputed evidence that it did not have an attorney mentor position, that it had transferred plaintiff out of the loss mitigation unit to work as an assistant to the head of the litigation department, and that plaintiff was ineligible for a raise at the time of her request because she had been working for the firm for less than a year.

Plaintiff also alleged that McCalla Raymer had unlawfully retaliated against her for filing an EEOC charge by giving her a negative performance review and a written reprimand. The Magistrate Judge, however, found that the alleged retaliation did not constitute adverse employment actions and, even if they had, there was no evidence that they were causally linked to her filing of an EEOC charge. Moreover, the Magistrate Judge found that McCalla Rayner had proffered legitimate, nondiscriminatory reasons for plaintiff's evaluation and reprimand, i.e., client and co-worker complaints about her rude and demanding personality, and that plaintiff had failed to present evidence that these reasons were not worthy of belief or that McCalla Raymer's actions were actually motivated by retaliatory intent.

Finally, the Magistrate Judge also found that plaintiff could not sustain her state law claims for intentional infliction of emotional distress, defamation, fraud, statutory conspiracy, and breach of fiduciary duty.

IV. Discussion

A. Plaintiff's Motion to Stay Order

Since the Magistrate Judge has already issued her Order and R&R addressing, among other things, the issues of the authenticity of the Swanson letter and the imposition of Rule 11 sanctions, plaintiff's motion to stay order, which sought to stay the Magistrate Judge's ruling on these issues, is denied as moot.

B. Plaintiff's Objections to the Magistrate Judge's Order and R&R

Plaintiff filed 56 pages of objections to the Magistrate Judge's Order and R&R. Remarkably, however, *none* of the objections addresses the Magistrate Judge's findings and recommendations on the merits of plaintiff's claims. Instead, plaintiff's objections are focused entirely on the Magistrate Judge's holding of an evidentiary hearing on the authenticity of the Swanson letter, her admission of April Robinson's sworn statement at that hearing, and her subsequent Order imposing Rule 11 sanctions on plaintiff, granting defendants' motion to strike her statement of undisputed material facts and her response to defendants' statement of undisputed material facts, and denying plaintiff's motion to strike defendants' motion for summary judgment. Plaintiff also objects to the Magistrate Judge's failure to address an alleged pattern of misconduct by defendants. All of plaintiff's objections are without merit.

First, plaintiff argues that the Magistrate Judge erred in holding the evidentiary hearing and admitting April Robinson's sworn statement without first conducting a hearing or reviewing the statement *in camera* to determine

whether the statement had been properly withheld from plaintiff. There is no reason, however, why a pre-hearing hearing or review should have been conducted to determine the admissibility of the Robinson statement. It was well within the Magistrate Judge's discretion to make that determination at the evidentiary hearing itself.

Second, plaintiff argues that the Magistrate Judge should not have admitted the Robinson statement because it was taken in violation of Fed. R. Civ. P. 30(b)(1), which provides that "[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action." The rules, however, do not prohibit a party from obtaining an affidavit or sworn statement from a witness without notice to the opposing party and using the statement or affidavit in connection with a pending motion even though the opposing party had no opportunity to cross-examine the witness. *See Curnow v. Ridgecrest Police,* 952 F.2d 321, 323-24 (9th Cir. 1991); *Reed v. Aetna Cas. & Surety Co.,* 160 F.R.D. 572, 574-75 (N.D. Ind. 1995); *Duffee v. Murray Ohio Mfg. Co.,* 160 F.R.D. 602, 604 (D. Kan. 1995).

Third, plaintiff argues that the Magistrate Judge erred in denying her motion to strike the affidavit of defendants' handwriting expert on the grounds that it was submitted in violation of Fed. R. Civ. P. 26(a)(2)(C), which requires timely disclosure of expert witnesses. The record, however, reveals no Rule 26 violation. Plaintiff did not even produce the Swanson letter to defendants until May 22, 2002, which was one day *after* the close of discovery. Just a week after receiving the document, defendants' counsel informed plaintiff's counsel of her belief that the letter was a forgery, and that she had initiated an investigation of the letter's authenticity, including retaining a

handwriting expert. The handwriting expert completed his analysis and executed his affidavit on August 20, 2002. Less than a month later, on September 16, 2002, defendants submitted the expert's affidavit to the Court and to plaintiff in support of their motion for a hearing.[2] After receiving the expert's affidavit, plaintiff had ample opportunity to conduct her own discovery, including deposing defendants' expert or retaining her own expert, before the hearing that occurred nearly four months later, on January 9, 2003. Instead, plaintiff and her counsel did nothing. The Magistrate Judge did not err in denying plaintiff's motion to strike.

Fourth, plaintiff contends that the Magistrate Judge erred in failing to address an alleged pattern of misconduct by defendants' counsel. However, there was no motion before the Court raising these issues, and the Magistrate Judge expressly limited the hearing to consideration of defendants' motion to discuss issues of alleged inappropriate conduct by plaintiff and defendants' motion to strike. Thus, the Magistrate Judge did not err by failing to consider other issues that plaintiff may have sought to raise.

Fifth, plaintiff objects to the Magistrate Judge's finding that the Swanson letter is a forgery and to her imposition of Rule 11 sanctions based on that finding. The

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[2] Plaintiff's counsel complains that defendants' counsel violated her commitment to present him with "affidavits and official reports before we approach the court with our findings." That commitment, however, was made before plaintiff's counsel chose to submit the forged document to the Court on two separate occasions in connection with two pending motions. Once that had happened, defendants' counsel had no choice but to take her evidence of forgery directly to the Court.

evidence, however, clearly supports the Magistrate Judge's finding as well as the imposition of sanctions.[3] The only disagreement this Court has with the Magistrate Judge is that her Order imposes sanctions only on plaintiff and not on plaintiff's counsel. The Magistrate Judge made findings, which are well supported by the record, that warrant the imposition of Rule 11 sanctions on plaintiff's counsel as well as plaintiff. Specifically, the Magistrate Judge found that "Plaintiff's counsel did not make an objectively reasonable inquiry into the factual basis of the Swanson letter as required by Rule 11 . . . [but] exhibited a deliberate indifference to facts which would be obvious to any reasonable person that the Swanson letter is a forgery." R&R at 11. The Court concludes that the monetary sanctions imposed by the Magistrate Judge should be imposed on plaintiff and plaintiff's counsel, jointly and severally. The Magistrate Judge's Order will be amended accordingly.[4]

Finally, plaintiff objects to the Magistrate Judge's striking of plaintiff's statement of undisputed facts and response to defendants' statement of undisputed facts and to the Magistrate Judge's refusal to strike defendants' motion for summary judgment. The Court concludes that the Magistrate Judge was warranted in striking plaintiff's statement of undisputed material facts on the grounds

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[3] Plaintiff relies on the report of a belatedly retained handwriting expert. Not only is this expert evidence submitted too late, but it also fails to show that the Swanson letter is authentic. Plaintiff's expert merely concludes that "no conclusion can be drawn" as to whether Elaine Swanson actually signed the Swanson letter.

[4] The Court has reviewed defendants' listing of expenses and attorney's fees and supporting documentation and finds that the total amount of $35,145.75 is reasonable.

that plaintiff's affidavit, which was cited in support of most of the facts, was stricken because it contained fraudulent assertions; and, in any event, the affidavit did not actually support most of the alleged facts and contained mostly vague and conclusory allegations. The Magistrate Judge was also warranted in striking plaintiff's response to defendants' statement of undisputed material facts on the grounds that the response did not properly respond to defendants' alleged facts, record citations did not support plaintiff's contentions, and plaintiff relied in part on her complaint, her stricken affidavit, and the forged Swanson letter. The Magistrate Judge also properly denied plaintiff's motion to strike defendants' motion for summary judgment because, contrary to plaintiff's contention, the motion fully complied with the Court's local rules.

C. Defendants' Motion for Summary Judgment

The Magistrate Judge found that the undisputed evidence demonstrated that all of plaintiff's claims were without merit as a matter of law. Accordingly, she recommended that defendants' motion for summary judgment be granted. As noted above, plaintiff has raised no objections to the Magistrate Judge's findings and recommendations on her substantive claims. After a *de novo* review of the record, the Court concludes that the R&R is correct. Accordingly, the Court adopts the R&R as the order of the Court and grants defendants' motion for summary judgment.

D. Defendants' Motion to Impose Appropriate Sanctions Direct Proper Referrals, and Impose Other Remedies

Defendants seek the imposition of additional sanctions against plaintiff and her counsel based on their submission of the motion to stay order and, in particular, the purported affidavit of April Robinson attached to the motion. In addition, defendants ask the Court to refer this matter to the United States Attorney's office for investigation of possible criminal conduct and to the State Bar of Georgia for consideration of possible disciplinary proceedings against plaintiff's counsel. Notably, plaintiff and her counsel have failed to respond to defendants' motion. For the following reasons, the Court concludes that imposition of additional sanctions and referral for further investigation and possible prosecution and institution of disciplinary proceedings are warranted.

First, plaintiff's motion to stay order is plainly frivolous. In the motion, filed on January 28, 2003, plaintiff asks the Magistrate Judge to delay her ruling on issues relating to the Swanson letter until plaintiff has had the opportunity to retain her own expert to examine the letter. This request came almost eight months after plaintiff's counsel was first notified, on May 30, 2002, of defendants' counsel's belief that the Swanson letter was a forgery. At that time, plaintiff's counsel took no action to investigate the authenticity of the letter. To the contrary, without conducting any investigation, he chose to rely on the letter in support of plaintiff's motion to amend her complaint and in opposition to defendants' motion for summary judgment.

Defendants again challenged the authenticity of the letter in their response and reply to plaintiff's submissions, filed on July 15, 2002, and September 16, 2002, respectively. In the latter filing, defendants also requested a hearing to discuss "inappropriate conduct by plaintiff" and attached the affidavit of a handwriting expert attesting that the Swanson letter was a forgery. Still, plaintiff's counsel took no action to conduct his own inquiry into the authenticity of the letter.

Finally, on December 13, 2002, the Magistrate Judge notified counsel that she would consider this matter, including the possible imposition of Rule 11 sanctions, at a hearing to be held on January 9, 2003. Yet, when the Magistrate Judge inquired at the hearing what steps plaintiff's counsel had taken to determine whether the Swanson letter was a fraud, he responded that he had done nothing other than inquire whether the attorney who had provided plaintiff the file containing the letter had another copy of it.

Incredibly, after eight months of repeated notices and nearly three weeks after the Magistrate Judge's hearing on the matter, plaintiff's counsel had the temerity to file the motion to stay, asking for additional time so he could undertake an investigation. Such a request goes beyond being merely frivolous and borders on the contemptuous. At the very least, defendants are entitled to recover their costs, including reasonable attorney's fees, for having to respond to such a request.[5]

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[5] Although the motion to stay was mooted the next day when the Magistrate Judge entered her Order and R&R, given the egregious

(Continued on following page)

Accordingly, the Court orders plaintiff and plaintiff's counsel to reimburse defendants the amount of their expenses, including reasonable attorney's fees, incurred in responding to plaintiff's motion to stay order. Within 10 days from the date of entry of this order, defendants' counsel shall submit an affidavit and supporting documentation showing the total amount of expenses incurred. Plaintiff shall have 10 days after service to respond with any objections as to the amount of such expenses. The Court will then enter an appropriate award.

Second, and even more serious than the frivolousness of plaintiff's motion to stay, are the issues raised by the purported affidavit of April Robinson attached to the motion. The affidavit contains the most scurrilous allegations imaginable, i.e., that defendants' counsel obtained Robinson's August 30, 2002, statement by offering her $15,000 to lie. The affidavit is deeply disturbing to the Court for a number of reasons.

The affidavit contains allegations of bribery and subornatio.. of perjury against a longstanding member of the bar who has an unblemished record of integrity and professionalism. That attorney has filed an affidavit unequivocally denying the allegations contained in the affidavit. Furthermore, not only is the veracity of such allegations inherently suspect, but the irregular form of the affidavit itself suggests that it may have been manufactured. The pages are unnumbered. The seventh page contains a single paragraph, number 20, while the eighth page contains a repeat of paragraph 20 plus a paragraph

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allegations contained in the affidavit attached to the motion, *see* discussion *infra*, defendants clearly had no choice but to respond to it.

21. The last page contains no allegations at all but is solely a signature page.

The veracity of the affidavit is also suspect in light of the multiple assertions made in Robinson's August 30, 2002, statement that she was appearing at her own request of her own free will and despite fear of retribution if her mother should learn of her confession. In her statement, Robinson cited a history of physical and mental abuse by her mother, which began when she was a child and continued up until the date of her sworn statement. Defendants also point out inconsistencies between the Robinson affidavit and other established facts, including the tape recordings of Robinson's initial telephone messages left for defendants' counsel, which have been preserved and transcribed.

Of greatest concern to the Court is the act of plaintiff's counsel in submitting such an inherently suspect and inflammatory document to the Court, apparently without making any effort to verify the allegations it contained. Defendants' counsel attests that before filing the affidavit plaintiff's counsel made no effort to contact her about Robinson's allegations, and there is no indication that plaintiff's counsel undertook any other investigation of the truthfulness of the allegations or the genuineness of the affidavit. Rather, just as with the Swanson letter, it would appear that plaintiff's counsel presented to the Court and relied on suspect evidence without undertaking any investigation whatsoever.

Given the egregious nature of the allegations it contains and its apparent lack of veracity, the Court concludes that the Robinson affidavit should be stricken from the record. In addition, in light of the apparent

falsity of the Robinson affidavit and the possibility that it may be a fraudulently manufactured document, and viewing it together with the Swanson letter, which the Court has determined to be a forged document, and given that plaintiff's counsel submitted both the Swanson letter and the Robinson affidavit to the Court without any apparent investigation of their truthfulness or authenticity, the Court concludes that this matter should be referred to appropriate authorities for further investigation and prosecution of plaintiff and/or plaintiff's counsel. Accordingly, the Court will refer this matter to the United States Attorney for the Northern District of Georgia, the Court's Committee on Discipline, and the State Disciplinary Board of the State Bar of Georgia.

V. Summary

For the foregoing reason, the Court

(1) AFFIRMS the Magistrate Judge's Order [#59-1 in Civil Action No. 1:01-cv-1414-MHS; #57-1 in Civil Action No. 1:01-cv-1749-MHS], except that the Court AMENDS the Order to provide that the monetary sanctions imposed by the Magistrate Judge shall be imposed on both plaintiff and plaintiff's counsel, jointly and severally; and

(2) FINDS that the appropriate amount of such sanctions is $35,145.75 and ORDERS plaintiff and plaintiff's counsel to pay defendants this amount within 30 days of the date of entry of this order;

(3) ADOPTS the Magistrate Judge's R&R [#59-1 in Civil Action No. 1:01-cv-1414-MHS; #57-1 in Civil Action No. 1:01-cv-1749-MHS] as the order of the Court and GRANTS defendants' motion for summary judgment [#30-1 in Civil

Action No. 1:01-cv-1414-MHS; #36-1 in Civil Action No. 1:01-cv-1749-MHS];

(4) DENIES AS MOOT plaintiff's motion to stay order [#58-1 in Civil Action No. 1:01-cv-1414-MHS; #56-1 in Civil Action No. 1:01-cv-1749-MHS];

(5) GRANTS defendants' motion to impose appropriate sanctions, direct proper referrals, and award other remedies as the Court sees fit [#63-1 in Civil Action No. 1:01-cv-1414-MHS; #62-1 in Civil Action No. 1:01-cv-1749-MHS];

(6) ORDERS plaintiff and plaintiff's counsel to pay defendants' expenses, including reasonable attorney's fees, incurred by defendants in responding to plaintiff's motion to stay order, DIRECTS defendants' counsel to submit within 10 days of the date of entry of this order an affidavit and supporting documentation showing the total amount of such expenses, DIRECTS plaintiff to respond within 10 days after service thereof with any objections as to the amount of such expenses, and DIRECTS the Clerk to resubmit this case after expiration of the above time period;

(7) STRIKES from the record the affidavit of April Robinson, dated January 23, 2003, and attached to plaintiff's motion to stay order; and

(8) DIRECTS the Clerk to forward a copy of this order, as well as a copy of the Magistrate Judge's Order and R&R, to William S. Duffey Jr., United States Attorney for the Northern District of Georgia, with a request that he undertake an investigation of this matter to determine whether any criminal prosecution is warranted in connection

with the preparation and submission to the Court of the Swanson letter and the Robinson affidavit; and

(9) REFERS this matter to the Court's Committee on Discipline for investigation of the conduct of plaintiff's counsel, Levi Breedlove, and to the State Disciplinary Board of the State Bar of Georgia for investigation and prosecution of Mr. Breedlove by that Board, if warranted, in connection with the preparation and submission to the Court of the Swanson letter and the Robinson affidavit; and, to effect these referrals, DIRECTS the Clerk to furnish a copy of this order, as well as the Magistrate Judge's Order and R&R, to the Chairman of the Court's Committee on Discipline and to the General Counsel of the State Bar of Georgia; and

(10) DIRECTS the Clerk to enter final judgment in favor of defendants and against plaintiff dismissing this action with prejudice and imposing all costs on plaintiff.

IT IS SO ORDERED, this 27 day of March, 2003.

/s/ Marvin Shoob
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS, Plaintiff, v. McCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, LLC, PENNY A. ALPER (official capacity and personally), CHRISSA HAMMOND (official capacity and personally), Defendants.	CIVIL ACTION FILE NO. 1:01-CV-1414-MHS
QUEEN STARKS, Plaintiff, v. McCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, LLC, PENNY A. ALPER (official capacity and personally), CHRISSA HAMMOND (official capacity and personally), Defendants.	CIVIL ACTION FILE NO. 1:01-CV-1749-MHS

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

(Filed Jan. 29, 2003)

Attached is the report and recommendation of the United States Magistrate Judge made in this action in

accordance with 28 U.S.C. § 636 and this Court's Local Rule 72.1C. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation ***within eleven (11) days of the receipt of this Order***. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. denied* 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED, this 29th day of JANUARY, 2003.

/s/ Linda T. Walker
LINDA T. WALKER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS, Plaintiff, v. McCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, LLC, PENNY A. ALPER (official capacity and personally), CHRISSA HAMMOND (official capacity and personally), Defendants.	CIVIL ACTION FILE NO. 1:01-CV-1414-MHS
QUEEN STARKS, Plaintiff, v. McCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, LLC, PENNY A. ALPER (official capacity and personally), CHRISSA HAMMOND (official capacity and personally), Defendants.	CIVIL ACTION FILE NO. 1:01-CV-1749-MHS

MAGISTRATE JUDGE'S ORDER AND FINAL REPORT AND RECOMMENDATION

Presently before the Court is Defendants McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, LLC's ("McCalla Raymer" or "the firm"), Penny Alper's, and Chrissa Hammond's (collectively "Defendants") Motion for Summary

Judgment. Docket Entry [30]. Plaintiff has filed a Motion to Strike Defendants' Motion for Summary Judgment. Docket Entry [37]. Defendants have also filed a Motion for a Hearing to Strike Plaintiff's Affidavit for Violating Rule 56(g), and Motions to Strike Plaintiff's Statement of Undisputed Facts and Plaintiff's Response to Defendants Statement of Undisputed Facts. Docket Entries [50].

For the reasons more fully set forth below, Plaintiff's Motion to Strike Defendants' Motion for Summary Judgment is **DENIED**. Defendants' Request to Strike Plaintiff's Affidavit is **GRANTED**. Likewise, Defendants' Motions to Strike Plaintiff's Undisputed Statement of Facts and Plaintiff's Response to Defendants' Statement of Undisputed Facts are **GRANTED**. Furthermore, the undersigned **RECOMMENDS** that Rule 11 sanctions be imposed on both Plaintiff and Plaintiff's counsel. **IT IS FURTHER RECOMMENDED** that Defendants' Motion for Summary Judgment be **GRANTED**.

DEFENDANTS' MOTION FOR A HEARING ON RULE 56(G) VIOLATION

Plaintiff, who is African-American, initiated this litigation against the named Defendants by filing a *pro se* action in State Court of Fulton County on May 16, 2001, alleging defamation, intentional infliction of emotional distress, fraud and actual fraud, statutory conspiracy, and breach of a fiduciary duty. Defendants removed the action to the United States District Court for the Northern District of Georgia on the grounds that Plaintiff's claims arose under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* On June 14, 2001, Plaintiff filed a Complaint in the district court alleging

that Defendant McCalla Raymer discriminated against her on the basis of her race by failing to promote her to a Human Resources Manager position, promoting two white women to management positions instead of Plaintiff; denying Plaintiff a raise, and denying Plaintiff an attorney mentor. Plaintiff also alleges that Defendant McCalla Raymer retaliated against her in violation of Title VII by giving Plaintiff a negative performance evaluation and a written reprimand. Plaintiff subsequently moved to remand the first action back to state court. Docket Entry [3]. Defendants, however, filed a motion to consolidate the two cases, which the district court judge ultimately granted. Docket Entries [5 and 20].

On May 20, 2002, Plaintiff turned over documents to her counsel that were allegedly given to Plaintiff by her previous counsel for her worker's compensation case. (*See* Docket Entry [54], Ex. 1). Plaintiff's counsel, in a May 22, 2002 correspondence to Defendants' counsel, described a newly-discovered piece of evidence from Plaintiff's worker's compensation file, a letter to Plaintiff's treating physician, Dr. Orr, purportedly written by Defendant McCalla Raymer's office manager, Ms. Swanson (hereinafter the "Swanson letter"). (*See id.*). Discovery closed on May 21, 2002, and thus Defendants were not served with this new piece of evidence until after the discovery period had lapsed and after all the witnesses had been deposed. On May 30, 2002, Defendants' counsel sent a letter to Plaintiff's counsel stating that Defendants believed that the Swanson letter was a forgery. (*See* Docket Entry [54], Ex. 2). Defendants' counsel informed Plaintiff's counsel that neither Dr. Orr nor his office manager had ever seen the Swanson letter, and no original or copy was in Plaintiff's medical file, which was personally reviewed in their

presence by an investigator. (*See id.*). Defendants' counsel further informed Plaintiff's counsel that the Swanson letter was not found in the files of their attorney handling Plaintiff's worker's compensation claim, the insurance company records, or in the official medical records filed with the State Board of Worker's Compensation. (*Id.*). As a result of Defendants challenging the authenticity of the Swanson letter, Plaintiff's counsel insisted that all of the information gathered by Defendants in their investigation should be turned over to Plaintiff as outstanding discovery, including information on expert witnesses, and moreover, that Defendants were subject to sanctions under Rule 37(c)(1) for failing to disclose information required by Rules 26(a) and (e)(1). (*See* Docket Entry [54], Exs. 3-6). In spite of Defendants' challenge to the letter's authenticity as early as May 30, 2002, Plaintiff, on June 28, 2002, submitted the Swanson letter with her Motion for Leave to Amend to add Ms. Swanson, Dr. Orr, and Dr. Spector as new parties to her lawsuit. (*See* Docket Entry [27], Attach. A). In Defendants' response in opposition to Plaintiff's Motion for Leave to Amend, Defendants denied that Plaintiff's Attachment "A" was authored or signed by Ms. Swanson, and notified the Court that they were conducting an investigation into the letter's authenticity. (*See* Docket Entry [29]). On September 3, 2002, Plaintiff submitted the letter to the Court a second time, as Exhibit 12 to Plaintiff's Response to Defendants' Motion for Summary Judgment. (*See* Docket Entry [38], Ex. 12). Plaintiff also alludes to the letter in paragraph 16 of her affidavit, and relies on both the letter and her affidavit to support most of her undisputed material facts.

On September 12, 2002, Defendants requested a hearing regarding the submission of Plaintiff's affidavit in

bad faith in violation of Federal Rule of Civil Procedure 56(g). The Court granted Defendants' request for a hearing on December 13, 2002, and *sua sponte* ordered the hearing to investigate potential Rule 11 sanctions with regards to the allegedly fraudulent Swanson letter. (*See* Docket Entry [55]).

HEARING ON VIOLATIONS OF RULE 56(g) AND RULE 11

On January 9, 2003, the Court held an evidentiary hearing regarding Defendants' allegations of fraud and bad faith on the part of the Plaintiff. (*See* Docket Entry [57]). Defendants challenge the veracity of Plaintiff's affidavit inasmuch as it relies on the Swanson letter and on Plaintiff's alleged on-the-job injuries, both of which Defendants contend are fraudulent. Defendants also argue that Plaintiff's affidavit was submitted in bad faith because Plaintiff repeatedly cites to her affidavit to support her Statement of Undisputed Facts, which do not support or support only in part the facts for which they are cited. Seven of Plaintiff's references to her affidavit support only in part the alleged undisputed facts for which they are cited while nineteen of Plaintiff's references to her affidavit do not mention at all the alleged undisputed reference for which each is cited.

In support of Defendants' allegation that the Swanson letter is a forgery they submitted the following: (1) examples of Ms. Swanson's signature and the credentials and affidavit of Arthur Anthony, a forensic handwriting expert, attesting that the Swanson letter is a forgery; (2) the affidavit of attorney Christine Huffine, who represents Defendant McCalla Raymer in Plaintiff's worker's compensation case,

State Board of Worker's Compensation Claim No. 237-15-3474 and is involved in the day-to-day management of that claim including all correspondence between the parties, swearing that no such letter or copy of such letter exists in Plaintiff's worker's compensation file; (3) the affidavit of Dr. Orr, swearing that no such letter was in Plaintiff's medical file in his office; and (4) the affidavit of Gloria Jackson, Dr. Orr's office manager, also attesting that no such letter exists in Plaintiff's medical file. Defendants subsequently supplemented this evidence with the affidavit of Ms. Swanson, swearing that she did not write or sign the letter, nor was it prepared at her direction, and that no other person had or has the authority to execute such a letter. (*See* Docket Entry [56]). Consequently, Defendants argue that Plaintiff's affidavit was submitted in bad faith in violation of Rule 56(g) and should be stricken.

For the reasons set forth below, the Court finds that the Swanson letter, Exhibit 12 to Plaintiff's Response to Defendants' Motion for Summary Judgment, is fraudulent and that Plaintiff's affidavit was submitted in bad faith.

At the hearing before the undersigned held on January 9, 2003, at which notably the Plaintiff did not appear, Plaintiff's counsel represented to the Court that he had received Plaintiff's worker's compensation file which contained the Swanson letter around May 10, 2002, but that he did not retrieve the letter from the file until May 20, 2002. (Transcript of Evidentiary Hearing held on January 9, 2003, (hereinafter "Tr.") at 38-39).[1] However,

[1] Plaintiff's counsel previously represented to the Court, and to Defendants' counsel, that Plaintiff turned over the file to Plaintiff's counsel on May 20, 2002. (*See* Docket Entry 54, Ex. 1).

the Court noted that at Ms. Swanson's deposition on May 1, 2002, Plaintiff's counsel asked very pointed questions which seemed specifically drawn from the Swanson letter which Plaintiff's counsel alleges he did not have in his possession until around May 10, 2002, and did not look at until May 20, 2002. (Tr. at 40-41). When the Court inquired of Plaintiff's counsel about the questions he asked of Ms. Swanson at her deposition on May 1, 2002, Plaintiff's counsel indicated that although he had not seen the Swanson letter at that time, Plaintiff had informed him of the contents of the letter and he thus formulated his deposition questions to Ms. Swanson based upon what Plaintiff had told him. (*Id.*)

In a May 22, 2002, correspondence to Defendants' counsel, Plaintiff's counsel described the Swanson letter that he had recently discovered in Plaintiff's worker's compensation file. *See* Docket Entry 54, Ex. 1).[2] On May 30, 2002, Defendants' counsel sent a letter to Plaintiff's counsel stating that Defendants were taking the position that the letter was a forged document. (*See* Docket Entry [54], Ex. 2). Defendants' counsel further informed Plaintiff's counsel that neither Dr. Orr nor his office manager had ever seen the letter, and no original or copy was in Plaintiff's medical file which was personally reviewed in their presence by an investigator. (*See id.*). Defendants' counsel further stated that the letter was not found in their attorney's files handling Plaintiff's worker's compensation claim, the insurance company records, or in the

[2] The Court notes that discovery closed on May 21, 2002, and therefore Defendants were not served with this newly-discovered evidence until after the discovery period had lapsed and after all witnesses had been deposed.

official medical records filed with the State Board of Worker's Compensation.

In response to the Court's inquiry regarding Plaintiff's position with regard to the authenticity of the Swanson letter, Plaintiff's counsel represented to the Court that the only action he took with regards to investigating the authenticity of the Swanson letter was asking Plaintiff's previous law firm handling her worker's compensation case if they had another copy of the letter. (Tr. at 24). Plaintiff's counsel stated that Plaintiff's previous law firm had turned over Plaintiff's complete file to the Plaintiff herself but did not maintain a copy of Plaintiff's file. (*Id.*). Rather than conduct a reasonable inquiry into the authenticity of the document, Plaintiff's counsel chose instead to rely on Defendants' counsel's assurances that she would provide him with the results of Defendants' continued investigation into the document's authenticity. Plaintiff's counsel never hired an expert of his own to analyze the handwriting on the document, never attempted to depose Defendants' expert, or even attempt to obtain a sample of Ms. Swanson's handwriting to compare with the challenged document. (Tr. at 28-29). During the pendency of the forgery investigation, which Defendants' counsel represented that it took four to five months to fully complete, (Tr. at 34), Plaintiff's counsel submitted the Swanson letter as an attachment to Plaintiff's Motion to Amend, filed on June 28, 2002. (*See* Docket Entry [27], Attach. A). In Defendants' response in opposition to Plaintiff's Motion for Leave to Amend, Defendants denied that Plaintiff's Attachment "A" was authored or signed by Office Manager Elaine Swanson, and notified the Court that they were conducting an investigation into the letter's authenticity. (*See* Docket Entry [29]). Plaintiff subsequently filed the

letter with the Court again on September 3, 2002, as evidence in support of Plaintiff's opposition to summary judgment. (*See* Docket Entry [38], Ex. 12). Plaintiff's counsel now represents to the Court that Defendants' counsel's conduct constituted unfair "surprise" because Defendants were not forthcoming with the results of their forgery investigation and hand writing expert as promised and therefore Plaintiff's counsel assumed that the document was not a forgery. (Tr. at 24-27). Plaintiff's counsel further represented to the Court that had he received something from Defendants' counsel saying definitively that the letter was a forgery, that Plaintiff's counsel would not have used the letter. (Tr. at 27-28).

Rule 11 of the Federal Rules of Civil Procedure imposes an affirmative duty to investigate the facts and law that support a pleading or any other document filed with the court. *See* FED. R. CIV. P. 11(b); *see generally Business Guide, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 548 (1991) ("[Rule 11] states unambiguously that any signer [of court submission] must conduct a "reasonable inquiry" or face sanctions."); *Apostol v. Landau*, No. 86 C 8070, 1994 WL 110172, at *1 (ND. Ill. Mar. 29, 1994). This duty to make a reasonable inquiry into the factual and legal basis of a claim requires that an attorney do more than simply rely on the mere allegations or testimony of his client. *Blue v. United States Dep't of the Army*, 914 F.2d 525, 542 (4th Cir. 1990), *cert. denied sum. nom., Chambers v. United States Dep't of the Army*, 499 U.S. 959 (1991); *see also Beeton v. Defoe*, 89 F.3d 827, No. 95-1734, 1996 WL 350526, at *3 (4th Cir. June 6, 1996) (holding that the district court did not abuse its discretion by imposing Rule 11 sanctions on an attorney for "relying on his client's naked assertions"). Even a good faith belief

in a client's assertions may "tempt[] fate under Rule 11" if counsel never objectively investigates the factual basis of such assertions. *Noe v. Interstate Brands Corp.*, 188 F.R.D. 513, 515 (S.D. Ind. 1999) (citations omitted). "Ordinarily, a reasonable inquiry would require that counsel interview the available witnesses, and review relevant documents – especially ***those in his client's possession***." *Apostol*, 1994 WL 110172, at *2 (emphasis added) (citations omitted). Plaintiff's counsel may not simply "*drop papers into the hopper and insist that the court or opposing counsel undertake bothersome factual and legal investigation.*" *Retired Chicago Police Ass'n v. Firemen's Annuity and Benefit Fund*, 145 F.3d 929, 934 (7th Cir. 1998) (quoting *Mars Steel v. Continental Bank, N.A.*, 880 F.2d 928, 932 (7th Cir. 1989)) (emphasis added). Thus, Rule 11 "requires lawyers to think first and file later." *Stewart v. RCA Corp.*, 790 F.2d 624, 633 (7th Cir. 1986).

Reasonableness is measured under the circumstances and according to "what was reasonable to believe at the time" a particular document, pleading, or motion was filed with the court. *Riccard*, 307 F.3d at 1294 (quoting *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998)). Sanctions are thus appropriate "when a party exhibits a 'deliberate indifference to obvious facts,' but not when the party's evidence to support a claim is 'merely weak.'" *Id.* Presenting a forged document to the coin, however, is never reasonable and clearly warrants sanctions under Rule 11. *Johnson v. Tuff N Rumble Mgm't, Inc.*, No. CIV.A. 99-1374, 2000 WL 622612, at *7 (E.D. La. May 15, 2000) (citing *Bout v. Bolden*, 22 F. Supp 2d. 653, 658 (E.D. Mich. 1998) (imposing Rule 11 sanctions against plaintiff who submitted forged memoranda as exhibits to summary judgment opposition)). Such a determination necessarily involves

some assessment of credibility, and though "credibility is generally a factual matter within the province of a jury, the 'fact-dependent legal standard mandated by Rule 11' is an issue for the district court to determine." *Pope v. Federal Express Corp.*, 974 F.2d 982, 984 (8th Cir. 1992) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990)).

This Court is hard-pressed to believe that Plaintiff's counsel had not seen the Swanson letter before deposing Ms. Swanson, based on the level of specificity of his questions. Furthermore, even if Plaintiff's counsel had not seen the Swanson letter before or as of May 1, 2002, he did not inform Defendants' counsel of the letter until May 22, 2002, after the discovery period had closed. As early as May 30, 2002, Defendants' counsel informed Plaintiff's counsel that Defendants believed that the Swanson letter was a forgery, stating that no such letter had been found in Dr. Orr's files, in the files the Defendants' attorney handling Plaintiff worker's compensation claim, the insurance company's records, or in the official medical records filed with the State Board of Worker's Compensation. Yet despite the serious allegation of forgery and the information provided by Defendants in support, Plaintiff's counsel still failed to make any reasonable investigation into the document's authenticity, which is especially troubling in view of the fact that Plaintiff had personally been in possession of her worker's compensation file before she handed it over to Plaintiff's counsel. (*See* Tr. at 35-36). Instead, it appears that Plaintiff's counsel chose to bury his head in the sand to what would likely be obvious to a reasonable person, forcing the Defendants to expend their own resources in investigating the authenticity of the document that Plaintiff produced. Additionally, in spite of

the looming allegations of forgery, Plaintiff submitted the document to the Court not once, but two times, in his Motion to Amend and in his opposition to Defendants' Motion for Summary Judgment. Although Plaintiff's counsel complains that he never received conclusive evidence from Defendants' investigation until they filed their reply brief to summary judgment, he still took no action at that time, nor did he put forth any of his own evidence at the January 9, 2003, hearing, which the Court ordered to hear issues regarding Rule 56(g) and *sua sponte* ordered the hearing for purposes of Rule 11 sanctions. Furthermore, at the hearing, Plaintiff's counsel continued to go forward with his position that he believes that the document is not a forgery and has since made no attempts to withdraw the document or to provide the Court with any evidence to show that the letter is authentic. The Court finds that Plaintiff's counsel did not make an objectively reasonable inquiry into the factual basis of the Swanson letter as required by Rule 11, and to the contrary, Plaintiff's counsel exhibited a deliberate indifference to facts which would be obvious to any reasonable person – that the Swanson letter is a forgery. The Court further finds that Plaintiff's affidavit was submitted in bad faith in furtherance of Plaintiff's fraud perpetrated on the Court. Plaintiff's affidavit alludes to particular documents submitted by Plaintiff in opposition to summary judgment, including this forged document, and draws conclusions therefrom. Moreover, Plaintiff's affidavit contains conclusory allegations, and does not support the Plaintiff's Statement of Undisputed Material Facts or Plaintiff's

Response to Defendants' Statement of Undisputed Material Facts.[3]

Based on these findings, the Federal Rules of Civil Procedure mandate that Plaintiff's counsel and/or Plaintiff herself be sanctioned for this conduct. First, pursuant to finding that Plaintiff's affidavit was submitted in bad faith,

> the court *shall* forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

FED. R. CIV. P. 56(g) (emphasis added).

Although Defendants requested that Plaintiff's affidavit be stricken, that is not a remedy provided for by Rule 56(g). However, pursuant to the Court's finding that Plaintiff's counsel violated Rule 11, the Court has the discretion to fashion an appropriate sanction. *See* FED. R. CIV. P 11(c); *Cooter & Cell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990) (citing FED. R. CIV. P. 11 advisory committee's note); *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1295 (11th Cir. 2002) (citing *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987) (en banc)). Courts should craft sanctions to serve the rule's purpose of deterrence and

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[3] Based upon Plaintiff's deposition testimony as well as the sworn statement of April Robinson, made a part of the record at the January 9, 2003 hearing, references to the Swanson letter and to Plaintiff's on-the-job-injuries she allegedly sustained at Defendant McCalla Raymer may be found perjurous.

punishment *See* FED. R. CIV. P. 11(c)(2) & 1993 advisory committee's note; *Riccard,* 307 F.3d at 1295; *Massengale v. Ray,* 267 F.3d 1298, 1302 (11th Cir. 2001). "Rule 11 sanctions are designed to discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." *Donaldson,* 819 F.2d at 1556 (internal quotations marks and citation omitted). Pursuant to the Court's discretionary authority to impose sanctions under Rule 11, the Court hereby strikes the Swanson letter, Exhibit 12 to Plaintiff's Response to Defendants' Motion for Summary Judgment as well as Plaintiff's affidavit.[4] Further, Plaintiff is hereby **ORDERED** to pay the Defendants' reasonable expenses, including attorney's fees and the expense of the handwriting expert, resulting from having to investigate the forgery, from May 22, 2002, until the date Defendants concluded their investigation. Plaintiff is also hereby **ORDERED** to pay Defendants' reasonable expenses and attorney's fees incurred in bringing the motion for the hearing, and pursuant to Rule 56(g), the reasonable expenses incurred as a result of the filing of Plaintiff's affidavit. Defendants are therefore **DIRECTED** to submit to the Court a listing of the above-stated expenses and attorney's fees within eleven (11) days of this order.

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[4] The undersigned also recommends to the District Court Judge that further Rule 11 sanctions may be warranted in this case against Plaintiff and Plaintiff's counsel for the frivolous nature of the claims in this lawsuit as well as other potentially manufactured documents. The undersigned directs the District Court Judge's attention to the sworn statement of April Robinson made a part of the record at the January 9, 2003 hearing and further notes that it may be appropriate to forward this case to the United States Attorney's Office for investigation into potential criminal conduct.

DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

Defendants request that the Court strike Plaintiff's Statement of Undisputed Material Facts and Plaintiff's Response to Defendants' Statement of Undisputed Material Facts because they are neither reliable nor supported by truthful references to sworn record evidence or exhibits which reflect the facts attributed to them. Defendants contend that Plaintiff's affidavit, which she cites as support for most of her undisputed material facts, was not properly executed, is false, and thus was not submitted in good faith. In response, Plaintiff first argues that it is inappropriate to have to defend her affidavit at this point in the litigation because at worst, her affidavit creates genuine issues of material facts.[5] Second, Plaintiff argues that her undisputed material facts and her response to Defendants' undisputed material facts should not be stricken because Defendants did not detail specific inaccuracies and did not cite to the record to dispute any such inaccuracies.

Because Plaintiff relies so heavily on her affidavit to support her alleged undisputed material facts and the Court has found that Plaintiff's affidavit contains fraudulent assertions and has stricken the affidavit as being submitted in bad faith, Plaintiff's Statement of Undisputed Material Facts should also be stricken. However, even if the Court did not strike Plaintiff's affidavit, it

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[5] The Court notes that Plaintiff submitted an unsigned and unnotarized affidavit with her Response to Defendants' Motion for Summary Judgment, filed on September 3, 2002. (*See* Docket Entry [38], Ex. 25). Plaintiff subsequently resubmitted a properly executed affidavit on September 12, 2002. (*See* Docket Entry [48]).

would still be appropriate to strike Plaintiff's Statement of Undisputed Material Facts because the assertions in Plaintiff's affidavit do not support her alleged undisputed facts. Moreover, to the extent that Plaintiff's affidavit relies on vague and conclusory statements, the Court would not rely on those statements in determining whether a genuine issue of fact exists. *See Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000) (refusing to rely on affidavit containing brief, conclusory assertions in determining summary judgment). Accordingly, Defendants' Motion to Strike Plaintiff's Statement of Undisputed Material Facts is **GRANTED**.

DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendants also request the Court to strike Plaintiff's Response to Defendants' Statement of Undisputed Material Facts because Plaintiff's responses do not create a genuine issue of material fact and are mostly nonresponsive.

The Court notes that many of Plaintiff's attempts to deny many of Defendants' undisputed facts by asserting that Defendants' facts are "self-serving affidavits and declarations" and suggesting what the "best evidence" in support of a particular fact would or should be. In addition, the facts which Plaintiff disputes with citation to the, record are not supported by their citations. Further, Plaintiff attempts to dispute some of Defendants' facts with citations to the Complaint, her affidavit, and the forged Swanson letter. Plaintiff's responses do not comply with the Federal Rules of Civil Procedure or the Local Rules and should be stricken as nonresponsive. Even if the

Court were not to strike Plaintiff's Response to Defendants' Statement of Undisputed Material Facts, Plaintiff's denials of Defendants' facts are still improper and thus Defendants' facts are deemed admitted under the local rules. *See* Local Rule 56.1B(2), NDGa. Accordingly, Defendants' Motion to Strike Plaintiff's Response to Defendants' Statement of Undisputed Material Facts is **GRANTED**.

PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff filed a motion to strike Defendants' Motion for Summary Judgment on the grounds that Defendant did not comply with the requirements of Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1(B)(1). Plaintiff argues that Defendants' statement of material facts includes more than "one sentence per number" as required by Local Rule 56.1(B)(1). In addition, Plaintiff argues that Defendants failed to cite to the record in their memorandum of law supporting their motion for summary judgment, instead citing merely to their own statement of material facts. Defendants contend that Local Rule 56.1(B)(1) does not impose the requirement of "one sentence per number" as suggested by Plaintiff and that Defendants' memorandum of law in support of their motion for summary judgment adequately cites to the record because it cites to the statement of material facts which is cross-referenced with specific portions of the record.

Local Rule 56.1(B)(1) states:

> The movant for summary judgment shall attach to the motion a separate and concise statement of the material facts to which the movant contends

> there is no genuine issue to be tried. Each material fact shall be numbered separately. Statements in the form of issues or legal conclusions (rather than material facts) will not be considered by the court. Affidavits and the introductory portions of briefs do not constitute a statement of material facts.

L.R. 56.1(B)(1), NDGa.

Nowhere does this rule require that there only be "one sentence per number." The rule does require that "[e]ach material fact be numbered separately." That is not to say, however, that multiple facts, which are not by themselves material, cannot be included in one numbered paragraph. Plaintiff also argues that Defendants impermissibly cited to their own statement of material facts in their memorandum of law supporting their motion for summary judgment, rather than to the record. In support, Plaintiff quotes language from an unattributed source, "[E]very factual statement made in the parties' briefs should be followed by a citation to the record . . . includ[ing] specific page or paragraph numbers, where appropriate. . . . Citations should not be made to the parties' statement of material facts or response thereto." (Pl.'s Mot. to Strike Defs.' Motion for Summary Judgment (hereinafter "DMSJ"), p. 2). The Court could not find any such case that contains this quotation or similar language which prohibits a party from citing to the facts, which are cross-referenced to the record, in its memorandum of law supporting a summary judgment motion. It is true, as Plaintiff notes, that the parties are responsible for "direct[ing] the Court's attention to each portion of the record which supports each of the party's distinct arguments." *Dickson v. Amoco Performance Products, Inc.*, 845 F. Supp. 1565,

1570 (N.D. Ga. 1994). However, Defendants' factual citations supporting their arguments in their memorandum of law are cross-referenced to specific places in the record. The Court finds that Defendants' Motion for Summary Judgment meets the standards set forth by Federal Rule of Civil Procedure 56 and Local Rule 56.1(B)(1). Therefore, Plaintiff's Motion to Strike Defendants' Motion for Summary Judgment is **DENIED**.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In seeking summary judgment, Defendants contend that all of Plaintiff's claims fail as a matter of law because: (1) Plaintiff cannot make out a prima facie case for failure-to-promote because she cannot show that she was qualified for any available positions that she sought, or that any such positions were awarded to equally or lesser qualified candidates; (2) Plaintiff cannot make a prima facie case of retaliation because she cannot show that she suffered an adverse employment action or that any alleged adverse employment action was causally linked to her protected activity; (3) Plaintiff cannot show that any conduct by Defendants was extreme and outrageous to support her state law claim for intentional infliction of emotional distress; (4) Plaintiff cannot show that she was defamed because she cannot prove any false or malicious statements made by Defendants, that any such statements were published and were not privileged, or that Plaintiff's reputation was damaged by the publication of defamatory language; (5) Plaintiff cannot establish a claim for fraud because she cannot show that Defendants knowingly or recklessly made a false representation with the intent to induce Plaintiff to act or refrain from acting, which Plaintiff

justifiably relied upon, and which resulted in any damages; (6) Plaintiff cannot establish that Defendants conspired to commit fraud against her because there is no cause of action for civil conspiracy in Georgia, nor can a corporation conspire with itself; and (7) Plaintiff cannot establish that Defendants breached a fiduciary duty to Plaintiff because, as an employee-at-will, she cannot show that she enjoyed a confidential relationship with Defendants.

I. STATEMENT OF FACTS

Plaintiff, who is African-American, began working for Defendant McCalla Raymer on August 23, 1999. (Defendants' Statement of Undisputed Facts ("DSUF") ¶ 4). Plaintiff had applied through a staffing agency and was seeking an office or paralegal position in a law firm. (DSUF ¶ 4). Defendant McCalla Raymer is a law firm in the Atlanta, Georgia area, whose practice is concentrated in residential and commercial real estate transactions, including foreclosures, bankruptcy, creditor's rights, landlord-tenant issues, and related business matters. (DSUF ¶ 1). The firm's success is based upon maintaining superior client satisfaction, which requires high sensitivity to the clients' needs, as well as efficient, competent, prompt, and cordial behavior from the firm's attorneys and support staff. (DSUF ¶ 1). Plaintiff was hired into the bankruptcy department as a bankruptcy specialist, a newly-created position in the loss mitigation unit. (DSUF ¶ 4). Employees in the loss mitigation unit solicit debtors or debtors' counsel to discuss alternative solutions to bankruptcy which would benefit the debtor while mitigating the clients' losses. (DSUF ¶ 3). In 1999 and 2000, Chrissa Hammond, a white female, managed the loss

mitigation unit, which was composed of two white males, two white females, and three black females. (DSUF ¶¶ 3, 5). The entire bankruptcy department, approximately 150 people, was managed by Penni Alper, a white female attorney. (DSUF ¶ 2).

Plaintiff performed the technical aspects of her job well. (Pl. Dep. p. 59; Raymer Aff. ¶ 4). On October 23, 1999, after two months on the job, Plaintiff sent a letter to the firm's director of human resources expressing interest in a supervisory or management position. (Pl. Dep. pp. 92-93, Ex.5). Plaintiff, for the first time, revealed to people at the firm that she had a law degree, though at that time, she had not yet taken the bar exam. (DSUF ¶ 6; Pl. Dep. pp. 21-23). Plaintiff has a naturally aggressive work ethic and an assertive personality, which has, on occasion, caused some coworkers, supervisors, clients, and customers to complain about Plaintiff's abrasive behavior. (Raymer Aff. ¶ 5; Hammond Dep. pp. 11-20, 31-32; Pl. Dep. pp. 123-24, 126-33, 190, 192-93).

In February of 2000, Plaintiff expressed interest in a recently-vacated human resource position. (*See* Pl.'s Resp. to DMSJ, Exs. 9, 10). As an alternative to the human resources position, Plaintiff requested that the Short Sales/Deed in Lieu desk of the loss mitigation unit be restructured and that she be made a unit leader. (*See id.*, Ex. 10). In March of 2000, the firm reorganized the bankruptcy department and eliminated the human resources position. (DSUF ¶ 10). The firm had functioned for nearly eighteen years without such a position, but had recently hired someone for a human resources position to deal with the rapid growth of the firm. (Raymer Dep. pp. 13-14). The firm was ultimately dissatisfied with the way the position worked out, and decided to eliminate the human resources

position rather than fill the vacancy. (Raymer Dep. pp. 13-14).

Also in March of 2000, Plaintiff sent an email to firm management requesting a promotion to a management position, a raise, and an attorney mentor. (DSUF ¶ 9; Pl.'s Resp. to DMSJ, Ex.11). On March 15, 2000, Defendant Alper, Defendant Hammond, Ms. Stephens-Taylor, and Richard Raymer, the managing partner of the firm, met with Plaintiff regarding her requests, and denied Plaintiff's requests for a management position and a raise because they felt that Plaintiff's temperament and level of professionalism were ill-suited for a management position. (Pl.'s Statement of Undisputed Material Facts ¶ 9; *see also* Pl.'s Resp. to DMSJ, Ex. 11). The next day, Plaintiff filed a Charge of Discrimination with the EEOC, alleging that she was denied a transfer out of her unit, a promotion, a raise, and an attorney mentor. (*See* DMSJ, Ex. 8).

During Plaintiff's employment in the bankruptcy department, only two management-level positions were filled. (DSUF ¶ 11). Michelle Stephens-Taylor was promoted to bankruptcy operations manager with responsibility for all processes related to the operation of the bankruptcy department, reporting directly to Penni Alper and supervising more than 100 employees. (DSUF ¶ 11). Ms. Stephens-Taylor had previously served as a unit leader at the firm and had more than fifteen years of experience in bankruptcy and mortgage banking. (DSUF ¶ 11). Tamara Williams was promoted to the position of bankruptcy administrator with responsibility for staff management. (DSUF ¶ 11). Ms. Williams had been employed at the firm for ten years and had supervisory and facilities management experience. (DSUF ¶ 11).

Mr. Raymer received Plaintiff's charges of employment discrimination on March 20, 2000, and forwarded the charge to counsel for investigation. (Raymer Aff. ¶ 13). On March 29, 2000, Plaintiff received a performance appraisal, which was prepared by Defendant Hammond, Plaintiff's supervisor. (DSUF ¶ 12). Defendant Hammond was not aware of Plaintiff's EEOC charges of employment discrimination at the time she prepared Plaintiff's performance evaluation and met with Plaintiff regarding her appraisal, and did not learn of Plaintiff's discrimination charge until April of 2000. (Hammond Dep. p. 47; Raymer Aff. ¶ 13). The evaluation process often takes more than thirty days to complete because the employee prepares a self-appraisal, the supervisor prepares an appraisal of the employee, and then the supervisor and other managers meet with the employee to discuss the evaluation and set goals for the future. (DSUF ¶¶ 12, 26; *See also* Pl. Dep., Exs. 7, 8). Defendant Hammond rated the technical categories of Plaintiff's performance as good, and praised her diligent worth ethic, good attendance, and willingness to work overtime. (*Id.*; *See also* Pl. Dep., Ex. 8). Defendant Hammond also documented recurring issues of Plaintiff being demanding and uncooperative with her peers and management, Plaintiff's anger and hostility, and her difficulty with accepting constructive criticism. (*Id.*; *See also* Pl. Dep., Ex. 8). Defendant Hammond did note that Plaintiff's attitude had improved and encouraged her to work on being more open minded and flexible. (*Id.*; *See also* Pl. Dep., Ex. 8). Defendant Hammond, Ms. Stephens-Taylor, and Ms. Williams met with Plaintiff to review the performance appraisal. (*See* Pl. Dep. p. 210; Hammond Dep. pp. 21-22). During the review, Defendant Hammond told Plaintiff that she had been overly aggressive and rude during a meeting attended by Defendant Alper, Defendant

Hammond, and a client, Tom Carey, that had taken place in late February or early March. (Pl. Dep. pp. 210-12; Hammond Dep. pp. 15-16, 18-21). During that meeting, Plaintiff interrupted the client and her managers, which made them uncomfortable, and raised complaints with the client that she had not previously discussed with her managers. (Hammond Dep. pp. 18-21). The next day Plaintiff submitted comments in response to Defendant Hammond's evaluation of Plaintiff, in which Plaintiff stated that Defendant Hammond was out of touch with what Plaintiff does and denied ever previously receiving a complaint about her anger or lack of professionalism. (*See* Pl. Dep., Ex. 8). Plaintiff further stated that she was willing to work hard to improve upon the areas in which she did not meet her supervisor's purported expectations. (*Id.*) Additionally, Plaintiff expressed her belief that she had been treated hostile since the time that the firm learned that she had a law degree, and suggested that the firm's management should undergo diversity training and that she would assist them in this endeavor. (*Id.*). Irrespective of the quality of Plaintiff's evaluation, Plaintiff was ineligible for a raise at that time, and would not become eligible for a salary increase until her one-year evaluation. (Hammond Dep. pp. 22-23).

On May 3, 2000, Defendant Alper received a complaint from a client regarding Plaintiff's unprofessional conduct of being "pushy, threatening, and rude to them and a borrower." (DSUF ¶ 15; Pl. Dep. pp. 216-17, Ex. 9). Defendant Hammond personally called the client to investigate the complaint. (Hammond Dep. pp. 27-28). On May 16, 2000, Mr. Raymer, Ms. Williams, Ms. Stephens-Taylor, and Carol Clark, an attorney partner and head of the firm's litigation department, met with Plaintiff to

discuss her conduct and a proposed solution. (Raymer ¶ 10). Because this was the second time that Plaintiff was formally counseled about her aggressive and unprofessional behavior toward a client, Defendant McCalla Raymer no longer wanted Plaintiff working in the bankruptcy department. (*See* Pl. Dep., Ex. 9). Plaintiff was offered, and she accepted, the opportunity to be transferred to the litigation department, where she would work directly under Ms. Clark as a paralegal/litigation assistant, with no change in her salary. (Pl. Dep. pp. 221-24). At this meeting, Plaintiff was given a disciplinary memorandum documenting her problems in the bankruptcy department and the solution to transfer Plaintiff to the litigation department. (*See* Pl. Dep., Ex. 9). Plaintiff's position as a loss mitigation specialist was filled by Sherita Grigsby, a black female. (Pl. Dep. pp. 228-29).

On June 16, 2000, Plaintiff fell on the job and filed a worker's compensation claim, and did not return to work for eight months. (Pl. Dep. pp. 230). On September 29, 2000, while Plaintiff was out of work on worker's compensation, Plaintiff filed another EEOC charge, alleging retaliation. On February 16, 2001, Elaine Swanson, Defendant McCalla Raymer's office manager, sent Plaintiff a letter notifying her that Defendant McCalla Raymer had received a work-release recommendation from Plaintiff's treating physician, Dr. Orr. (Pl. Dep. pp. 230-31 & Ex. 10). As Defendant McCalla Raymer's office manager, Ms. Swanson is responsible for initially recording an employee's claim by calling a 1-800-number for the insurance agents that handle worker's compensation, as well as for paying the insurance premiums. (Swanson Dep. pp. 11-14). Ms. Swanson has no direct contact with the employees' treating physicians. (Swanson Dep. pp. 12-13). The letter

from Ms. Swanson to Plaintiff further advised Plaintiff that she was required to return to work on February 26, 2001, or face termination. (*See* Pl. Dep. pp. 230-31 & Ex. 10). Plaintiff returned to work on February 26, 2001, accompanied by her daughter and granddaughter. (Pl. Dep. pp. 231-33). While waiting for her supervisor to come greet her in the reception area, Plaintiff fell again and was taken to the hospital in an ambulance. (Pl. Dep. pp. 232-34). In the next few weeks, Plaintiff corresponded with Ms. Swanson about returning to work. (Pl. Dep. pp. 235-37). As Defendant McCalla Raymer's office manager, Ms. Swanson handled employees' worker's compensations claims, in a minimal capacity of notifying the insurance carrier about an employee's claim. (Swanson Dep. pp. 11-12). On March 15, 2001, Ms. Swanson sent Plaintiff a letter notifying Plaintiff that in order to set up a meeting to discuss coming back to work, as Plaintiff had requested, Defendant McCalla Raymer needed medical releases from Plaintiff's treating physicians. (Pl. Dep. pp. 235-36 & Ex. 11). It is Defendant McCalla Raymer's policy that in order for an employee to return to work if out on medical leave, they must be released from their doctors. (*See* Swanson Dep. pp. 12-13; Pl. Dep. p. 236). To date, Plaintiff has never provided Defendant McCalla Raymer with medical releases and Defendant McCalla Raymer has never terminated Plaintiff. (DSUF ¶ 19).

II. CONCLUSIONS OF LAW

A. Summary Judgment Standard

At the summary judgment stage, the court must examine all evidence in the light most favorable to the non-moving party and resolve all reasonable doubts in her

favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Pipkins v. City of Temple Terrace*, 267 F.3d 1197, 1199 (11th Cir. 2001). A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

On a motion for summary judgment, "the moving party bears the initial burden to show, by reference to materials on file, that there are no genuine issues of material fact to be determined at trial." *Mullins v. Crowell*, 228 F.3d 1305, 1313 (11th Cir. 2000) (citing *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991)). Once the movant has shown the non-existence of any genuine issue of material fact, it is up to the Plaintiff to produce some evidence in support of her claim. *Anderson*, 477 U.S. at 252. Mere conclusory allegations of discrimination or harassment are not enough to withstand a motion for summary judgment. *Carter v. City of Miami*, 870 F.2d 578, 585 (11th Cir. 1989). In other words, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48 (1986). An issue is not genuine if it is unsupported by evidence or if it is created by evidence that is "merely colorable" or "not significantly probative." *Id.* at 250. Likewise, a fact is only material if it is so designated by controlling substantive law as an essential element of Plaintiff's case. *Id.* at 248.

If neither party can prove the existence or nonexistence of an essential element of a claim, summary judgment will

be granted if the movant shows that the Plaintiff will be unable to meet her burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The movant's burden therefore requires a "'showing' – that is, pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id.*

B. Plaintiff's Failure-to-Promote Claims

Plaintiff contends that Defendant McCalla Raymer discriminated against her on the basis of her race in violation of Title VII when Defendant McCalla Raymer failed to promote her to a vacant Human Resources Manager position and by promoting two equally or less qualified women outside of her protected class to management positions.[6]

Title VII provides that it is unlawful for an employer "to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1). Absent direct evidence of discriminatory intent, however, a plaintiff can

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[6] The Court notes that Plaintiff has not been entirely clear about which available positions she sought and was not given. However, the Court will examine the three management-level positions that existed or were filled during Plaintiff's active employment with Defendant McCalla Raymer. To the extent that Plaintiff seems to argue that she was not given a lead or management position of the Short/Sale Deed in Lieu desk, the record does not indicate that such a position was available and shows, instead, that Plaintiff requested that Defendant McCalla Raymer restructure its bankruptcy/mortgage department and create such a position specially for her. (*See* Pl. Reap. to DMSJ, Exs. 10, 11, 19).

establish his prima facie case of discrimination in a failure to promote case by showing that: (1) she was a member of a protected class; (2) she applied for and was qualified for a position for which defendant was accepting applications; (3) despite her qualifications, she was not hired; and (4) after her rejection, the position remained open or was filled by a person outside of his protected class. *See Schoenfeld v. Babbitt*, 168 F.3d 1257, 1267 (11th Cir. 1999) (explaining prima facie case in failure-to-hire situation); *Walker v. Mortham*, 158 F.3d 1177, 1192 (11th Cir. 1998), *cert. denied*, *Mortham v. Walker*, 528 U.S. 809 (1999).

In this case, the parties do not dispute that Plaintiff, a black woman, is a member of a protected class. Additionally, it is undisputed that Plaintiff made Defendant McCalla Raymer aware that she was interested in the vacated Human Resources Manager position or, in general, that she was interested in a management-level position with the firm. (*See* DSUF ¶ 6; DMSJ, Ex. 4; Pl. Resp. to DMSJ, Exs. 9, 10, 11). Consequently, Defendant McCalla Raymer contends that Plaintiff was not qualified for management-level positions, and with respect to the Human Resources Manager position, Defendant McCalla Raymer chose to eliminate the position after it was vacated.

Even construing the facts in the light most favorable to the Plaintiff, she still cannot make out, a prima facie case for Defendant McCalla Raymer's failure-to-promote her to the Human Resources Manager position because she cannot show that she was qualified. In support of her qualifications, Plaintiff directs the Court's attentions to an e-mail correspondence that she sent to Mr. Raymer, in which she mentioned that she attended law school, interned at the EEOC, and made vague references to her

previous work experience without naming an employer or attaching a resume. Moreover, at Plaintiff's deposition, she could not recall any of her educational background nor could she recall the specifics about her work experience prior to her employment with Defendant McCalla Raymer. (*See* Pl. Dep. pp. 19-31)[7] Based upon the foregoing, Plaintiff has failed to show that she was qualified for the Human Resources Manager position. Furthermore, Plaintiff cannot show that the position remained open or was filled by someone outside her protected class because Defendant McCalla Raymer presented evidence, unrefuted by Plaintiff, that the position was eliminated. Nevertheless, even assuming that Plaintiff could make out a prima facie case of failure-to-promote she cannot show that Defendant McCalla Raymer's proffered legitimate business reason for eliminating the Human Resources Manager position was pretext for discrimination.

Once a plaintiff has established her prima facie case, the defendant must articulate a legitimate, nondiscriminatory reason for its employment decision. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981). To satisfy this burden, the defendant need not persuade the court that it was actually motivated by the reasons proffered by the plaintiff. *Id.* at 254-55. The

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[7] Additionally, Plaintiff cannot remember, among other things, the city or state where she attended high school, her mother's name, when her father died, or when her children were born. (Pl. Dep. pp. 19, 187). Plaintiff argues that she suffers from long-term memory loss as the result of a head injury she received when she fell on Defendant McCalla Raymer's premises. (Pl. Resp. to DMSJ, p. 9). However, in Plaintiff's sworn affidavit, which the court already found was submitted in bad faith, Plaintiff asserts that she has "serious *short term* memory loss" due to the injuries she sustained at Defendant McCalla Raymer. (*See* Pl. Aff. ¶ 18).

defendant "need only produce admissible evidence which would allow the trier of fact to rationally conclude that the employment decision had not been motivated by discriminatory animus." *Id.* at 257. However, a hypothetical reason for the adverse employment action is not sufficient. *See Turnes v. AmSouth Bank N.A.*, 36 F.3d 1057, 1061-62 (11th Cir. 1994). The defendant cannot testify in abstract terms as to what might have motivated the decision-maker; it must present specific evidence regarding the decision-maker's actual motivations with regard to each challenged employment decision. *See IMPACT v. Firestone*, 893 F.2d 1189, 1193-95 (11th Cir. 1990). Thus, a plaintiff may survive summary judgment by making out a prima facie case and providing sufficient evidence to show that a defendant's proffered legitimate reason is unworthy of credence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *Chapman v. AI Transp.*, 229 F.3d 1012, 1024-25 & n.11 (11th Cir. 2000) (en banc).

Defendant McCalla Raymer presented evidence that the firm had functioned for nearly eighteen years without a Human Resources position but created that position at that time to deal with the rapid growth of the firm. (Raymer Dep. pp. 13-14). The firm was ultimately dissatisfied with the way the position worked out, and when the person in that position left the job, Defendant McCalla Raymer decided to eliminate the Human Resources position rather than fill the vacancy. (*Id.*). Plaintiff essentially argues that Defendant McCalla Raymer eliminated the position after Plaintiff expressed an interest in it in order to deprive Plaintiff of the position because of her race. Plaintiff provides no support for this argument, relying solely on her conclusory allegations of race discrimination. Mere conclusory allegations of discrimination

do not create genuine issues of material fact and are insufficient to withstand a motion for summary judgment. *Carter v. City of Miami*, 870 F.2d 578, 585 (11th Cir. 1989).

Plaintiff also alleges that Defendant McCalla Raymer discriminated against her on the basis of race because it promoted two equally or lesser qualified females to management positions during her employ with Defendant McCalla Raymer. Defendant argues, however, that Plaintiff cannot make out a prima facie case for failure-to-promote her to Bankruptcy Operations Manager or Bankruptcy Administrator, because Plaintiff cannot establish that she was qualified for those positions, nor can Plaintiff establish pretext by showing that she was so much more qualified than the women who received those positions that discrimination can be inferred.

Plaintiff argues, without support, that Defendant McCalla Raymer is estopped from asserting that Plaintiff was not qualified because Defendant McCalla Raymer did not publish the positions or any qualifications for the positions. Plaintiff also argues that Defendant McCalla Raymer did not establish what criteria was used to determine qualifications for these positions, other than submit the qualifications of the individuals promoted. This argument lacks merit because Plaintiff has not even established what her own qualifications were at the time she alleges she was discriminated against. In any case, Plaintiff cannot meet the fourth prong of her prima facie case with respect to the Bankruptcy Operations Manager position because that position was filled by an African-American female. (DSUF. ¶ 11). Thus, because Plaintiff has not met her burden of establishing her own qualifications, she is unable to make out a prima facie case for discriminatory failure-to-promote for either of the two

management positions. Nevertheless, even assuming Plaintiff could establish a prima facie case, Plaintiff cannot show that Defendant McCalla Raymer's decisions not to promote Plaintiff were pretext for race discrimination.

Defendant has presented evidence of the qualifications of Michelle Stephens-Taylor and Tamara Williams, who were promoted to Bankruptcy Operations Manager and Bankruptcy Administrator, respectively. The position of Bankruptcy Operations Manager involved overseeing responsibility for all processes related to the operation of Defendant McCalla Raymer's bankruptcy department, reporting to Defendant Alper, and supervising more than 100 employees. (DSUF ¶ 11). Ms. Stephens-Taylor had previously served as a unit leader at Defendant McCalla Raymer and had over fifteen years of experience in bankruptcy and mortgage banking. (DSUF ¶ 11). In comparison, Plaintiff had been employed at Defendant McCalla Raymer for approximately six months, in a nonsupervisory position, and had worked only in one area of the bankruptcy department: the loss mitigation unit. Likewise, with respect to the Bankruptcy Administrator position, which involved staff management, Plaintiff cannot show that she was more qualified than Ms. Williams. At the time Ms. Williams was promoted, she had been working for Defendant McCalla Raymer for ten years, and had supervisory and facilities management experience. (DSUF ¶ 11). In contrast, Plaintiff had been working for Defendant McCalla Raymer for less than a year, in a nonsupervisory position.

This Court is not allowed to second-guess the employer's assessment of the specific skills the employer desired for the job. *See Damon v. Fleming Supermarkets of*

Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999), *cert. denied*, 529 U.S. 1109 (2000) (emphasizing that courts "are not in the business of adjudging whether employment decisions are prudent or fair" and that the court's sole concern is whether unlawful discriminatory animus motivates a challenged employment decision). Likewise, a plaintiff cannot prove pretext by simply showing that he was better qualified than the individual who received the position and therefore the defendant's employment decision was erroneous. *Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1253 (11th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001) (citing *Alexander v. Fulton County*, 207 F.3d 1303, 1339 (11th Cir. 2000)). Rather, a plaintiff must show that he was "so much more qualified that the disparity virtually jumps off the page and slaps one in the face." *Walker v. Prudential Prop. and Cas. Ins. Co.*, 286 F.3d 1270, 1277 (11th Cir. 2002).

Plaintiff contends that her experience was comparable to that of Ms. Stephens-Taylor and Ms. Williams. Though Plaintiff questions Defendant McCalla Raymer's promotion decisions, "a plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where . . . the reason is one that might motivate a reasonable employer." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997), *cert. denied, sub. nom., Combs v. Meadowcraft Co.*, 522 U.S. 1045 (1998). Furthermore, "it is not the function of the jury to scrutinize the employer's judgment as to who is the best qualified to fill the position. . . . The single issue for the trier of fact is whether the employer's selection of a particular applicant over the plaintiff was motivated by discrimination." *Lee v.*

GTE Fla. Inc., 226 F.3d 1249, 1253 (11th Cir. 2000) (quoting *Deines v. Texas Dep't of Protective and Regulatory Servs.*, 164 F.3d 277, 281 (5th Cir. 1999)). Additionally, Plaintiff has not shown that she was so much more qualified than Ms. Stephens-Taylor and Ms. Williams that "the disparity virtually jumps off the page and slaps one in the face," Therefore, Plaintiff has not established that Defendant McCalla Raymer's nondiscriminatory reasons for not promoting Plaintiff were pretextual.

Accordingly, summary judgment should be **GRANTED** as to all of Plaintiff's failure-to-promote claims.

C. Plaintiff's Miscellaneous Discrimination Claims

Plaintiff's EEOC charge alleges that she was denied a transfer out of her unit and was denied a raise, and an attorney mentor, based on her race. Plaintiff has presented no evidence to support these allegations. In any event, Defendant has presented undisputed evidence that although Defendant McCalla Raymer did not have an "attorney mentor" position, Defendant McCalla Raymer did transfer Plaintiff out of the loss mitigation unit to work as an assistant to the head of the litigation department, attorney Carol Clark. (DSUF ¶¶ 16, 28). In addition, Defendant McCalla Raymer has presented undisputed evidence that because Plaintiff was ineligible for a raise, having only been employed for less than a year at the time she requested the raise. (DSUF ¶ 27). Accordingly, summary judgment should be **GRANTED** in favor of Defendants on these claims.

D. Plaintiff's Retaliation Claim

In Plaintiff's March 16, 2000 EEOC charge, Plaintiff contends that Defendant McCalla Raymer retaliated against her in violation of Title VII by giving her a negative performance review on March 30, 2000 and a written reprimand on May 16, 2000, which were based on fabrications and resulted in her being demoted.[6] Defendant McCalla Raymer concedes that Plaintiff engaged in protected activity by filing an EEOC charge on March 16, 2000, but contends that Plaintiff's retaliation claim fails as a matter of law because she cannot show an adverse employment action taken against her or that there was a causal connection between her protected activity of filing an EEOC charge and any alleged adverse employment action.

To establish her prima facie case of retaliation, a plaintiff must establish that (1) she was engaged in protected activity; (2) there was an adverse employment action; and (3) the adverse employment action was caused by her engaging in protected activity. *See* 42 U.S.C. 2000(e)(3)(a); *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076 (2001);

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[6] Plaintiff argues in her brief in opposition to Defendants' Motion for Summary Judgment that the adverse employment action she suffered was "hostility in Plaintiff's work environment, fabrication of peer discontent and failure to promote." (Pl. Resp. to DMSJ, p. 11). Plaintiff also states that Title VII's prohibition on discrimination with respect to the terms, conditions, or privileges of employment, is not limited to "'economic' or 'tangible' employment decisions but also 'includes requiring people to work in a discriminatorily hostile or abusive environment.'" (Pl. Resp. to DMSJ, p. 10 (quoting *Harriston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 919 (11th Cir. 1993)). No such quote can be attributed to Plaintiff's citation of *Harriston*, nor did the Court's search reveal Plaintiff's quotation in *any* federal case.

Sullivan v. Nat'l R.R. Passenger Corp., 170 F.3d 1056, 1059 (11th Cir. 1999); *Holifield v. Reno*, 115 F.3d 1555, 1556 (11th Cir. 1997). An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that "alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." *Gupta*, 212 F.3d at 587. An employee does not have to be the victim of an ultimate employment decision such as a wrongful termination or a discriminatory promotion to be the victim of an adverse employment action. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998). However, Plaintiff must show that a reasonable person would find that the action seriously and materially adversely changed the terms, conditions, and privileges of employment. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001); *Doe v. DeKalb County Sch. Dist*, 145 F.3d 1441, 1453 (11th Cir. 1998). Not "every unkind act" amounts to an adverse employment action; an employment action that imposes some de minimis inconvenience or alteration of responsibilities does not rise to the level of substantiality necessary to constitute an adverse employment action. *See Wu v. Thomas*, 996 F.2d 271, 274 n.3 (11th Cir. 1993); *Doe*, 145 F.3d at 1453.

Defendant argues that neither Plaintiff's performance evaluation of March 30, 2000, nor the written reprimand she received on May 16, 2000, constitute an adverse employment action, because the evaluation was overall very positive and, the factual assertions underlying any criticism were truthful. Moreover, Defendant contends that Plaintiff was not demoted, but rather, she was transferred to the litigation department with no change in her

salary, to a position that better suited Plaintiff's skills and also accommodated her previously-stated desire to utilize her legal skills and to have an attorney mentor. Furthermore, a retaliation claim "rarely may be predicated on [an] employer's allegedly unfounded criticism of an employee's job performance, where that criticism has no tangible impact on the terms, conditions, or privileges of employment" *Davis*, 245 F.3d at 1242. Thus, no reasonable fact-finder could conclude that Plaintiff's evaluation, written reprimand, and subsequent transfer to the litigation department to be the assistant to the head attorney of that department, seriously and materially adversely changed the terms, conditions, and privileges of Plaintiff's employment.

Even if Plaintiff's evaluation, reprimand and subsequent transfer can be considered an adverse employment action, Plaintiff cannot show that the adverse employment action was causally linked to her protected activity. In order for Plaintiff to establish causal link requirement of her prima facie case, she must establish that the protected activity and the adverse action were not wholly unrelated. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993). At a minimum, this requires Plaintiff to show that the employer's decision makers were actually aware of the protected expression at the time it took adverse employment action to establish his prima facie case. *Id.*; *Hairston v. Gainseville Sun Publ'g Co.*, 9 F.3d 913, 920 (11th Cir. 1993). It is insufficient for Plaintiff to show that someone in the organization knew of the protected expression; instead, she must show that the person taking the adverse action was aware of the protected expression. *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1119 (11th Cir. 2001). Knowledge is never imputed to certain decision makers

merely because other corporate employees were aware of the protected expression. *Brungart v. Bell South Communications*, 231 F.3d 791, 800 (11th Cir. 2000). However, the plaintiff may establish the defendants awareness of the protected expression by circumstantial evidence. *Goldsmith*, 996 F.2d at 1163.

In the present case, Plaintiff argues, without support, that the mere proximity in time of her March 16, 2000 EEOC charge and her March 30, 2000 evaluation provide the causal link of her prima facie case of retaliation. Plaintiff seems to suggest that because Mr. Raymer received her EEOC charge on March 20, 2000, Defendant Hammond had knowledge of the EEOC charge when she evaluated Plaintiff. However, knowledge simply cannot be imputed from Mr. Raymer to Defendant Hammond. *See Brungart*, 231 F.3d at 800; *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1354-55 (11th Cir. 1999). Moreover, Defendant McCalla Raymer argues, and Plaintiff has never disputed, that Defendant Hammond did not learn of Plaintiff's EEOC charge until some time in April of 2000. Thus, Defendant Hammond did not know about Plaintiff's EEOC charge at the time she evaluated Plaintiff. Further, the undisputed facts show that the evaluation process began several weeks before Plaintiff filed her EEOC charge, with Plaintiff preparing a self-appraisal, followed by Defendant Hammond's evaluation of Plaintiff, and culminating in a formal discussion about the evaluation. (*See* DSUF ¶ 12). Thus, Plaintiff cannot make out a prima facie case for retaliation.

Even if Plaintiff could make out a prima facie case for retaliation, she cannot establish pretext. Once plaintiff establishes his prima facie case, the defendant must then come forward with "legitimate reasons for the employment

action to negate the inference of retaliation." *Taylor v. Runyon*, 175 F.3d 861, 868 (11th Cir. 1999); *Goldsmith*, 996 F.2d at 1163. After the defendant offers legitimate reasons for the employment action, the plaintiff must introduce "evidence, . . . which taken in the light most favorable to the non-moving party, could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext, and that the action taken was in retaliation for engaging in the protected activity." *Hairston*, 9 F.3d at 919. Plaintiff is not required to introduce evidence beyond that introduced to establish his *prima facie* case. *See id.* The plaintiff may succeed in proving pretext either by directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1528-30 (11th Cir. 1997); *Evans v. McClaine of GA, Inc.*, 131 F.3d 957, 965 (11th Cir. 1997); *Hairston*, 9 F.3d at 921. In deciding whether the plaintiff can survive summary judgment when trying to indirectly prove pretext, the court must evaluate whether the plaintiff has demonstrated "such weaknesses, implausibilities, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538.

Plaintiff essentially argues that Defendant McCalla Raymer's proffered reason – receiving client and co-worker complaints about Plaintiff's rude and demanding personality – lacks credence and is therefore pretextual because she disputes the factual basis of her negative performance evaluation and written reprimand because two coworkers and a client denied complaining about Plaintiff and

because Plaintiff perceived her work performance as mostly excellent and outstanding and challenged Defendant Hammond's managerial capabilities. (*See* DMSJ, Exs. 5, 6).[9] Plaintiff also argues that "Defendant offers no evidence [like the affidavits of Tom Carey and Pam Bethea] to support their claim and thus there is a dispute as to whether [the complaints] occurred or occurred as related by Defendant," and as such, Defendants' summary judgment motion is fatally defective. (Pl.'s Resp. to DMSJ, p. 12 (citing *Celotex*, 477 U.S. 317, 321-22, citing in turn *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985)).

Initially, the Court notes that Plaintiff misunderstands *Celotex* and the burden of proof allocation at the summary judgment stage of the litigation. *Celotex* overruled *Catrett* for the very proposition cited by Plaintiff. *See Celotex*, 477 U.S. at 322-323 ("We think that the position

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[9] In support, Plaintiff submits (1) e-mails from two of Plaintiff's coworkers indicating that they did not have a problem with her; (2) a copy of a facsimile of a letter purportedly written by a borrower, Melody Wilson, to Defendant McCalla Raymer and one of its clients, Fleet, praising Plaintiff's work and complaining about the client representative, Pam Bethea, one of the clients that complained about Plaintiff; (3) an undated transcription of a message purportedly left on Plaintiff's home telephone answering machine by Melody Wilson, praising Plaintiff and complaining about Ms. Bethea, transcribed by an unknown "T. Starks."; and (4) a letter from Plaintiff to the EEOC investigator investigating Plaintiff's charges, further advising the investigator about her allegations of Defendants' discrimination, typed and assisted by an unknown "Tamara Starks." (*See* Pl.'s Resp. to DMSJ, Exs. 2, 3, 5, 6, 8). Documents that are not properly authenticated or verified do not meet the requirements of Rule 56(e) and should not be considered when evaluating a motion for summary judgment. *First Nat'l Life Ins. Co. v. Cal. Pacific Life Ins. Co.*, 876 F.2d 877, 881 (11th Cir. 1989); *Davis v. Howard*, 561 F.2d 565, 569 (5th Cir. 1977).

taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure") (footnote citation omitted). "[T]he burden of persuasion remains with the plaintiff throughout all discrimination cases." *Chapman v. AI Transp.*, 229 F.3d 1012, 1046 n.26 (11th Cir. 2000). Defendant McCalla Raymer has met its exceedingly light burden of production in articulating the reasons for Plaintiff's performance evaluation and written reprimand. Therefore, under the *McDonnell-Douglas* framework, the burden shifts back to Plaintiff to demonstrate "such weaknesses, implausibilities, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538.

Even construing the evidence, in a light most favorable to the Plaintiff, however, she still has not demonstrated that Defendant McCalla Raymer's proffered explanation of its actions is unworthy of credence or that Defendant McCalla Raymer's actions toward Plaintiff were more likely than not motivated by a discriminatory reason. First, the fact that a client and two co-workers may have denied complaining about Plaintiff when she confronted them does not necessarily establish that they did not complain about Plaintiff, nor does it refute the possibility that other clients or co-workers could have complained about Plaintiff's rude and demanding behavior. Second, Plaintiff's own assessment of her work performance is irrelevant because "the inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of his performance." *Holifield*, 115 F.3d at 1565. Defendant Hammond's evaluation of Plaintiff noted

recurring issues of Plaintiff being demanding and uncooperative with her peers and management, Plaintiff's anger and hostility, and Plaintiff's difficulty with accepting constructive criticism. (*See* DMSJ, Ex. 6). Defendant Hammond, in reviewing the evaluation with Plaintiff, counseled Plaintiff regarding her observations of Plaintiff's overly aggressive and rude behavior toward a client, Tom Carey, in a meeting also attended by Defendant Alper. (Pl. Dep. pp. 210-12; Hammond Dep. pp. 15-16, 18-21). During that meeting, Defendant Hammond observed that Plaintiff interrupted the client and her managers, making them uncomfortable, and raised complaints with the client that she had not previously discussed with her managers. (Hammond Dep. pp. 18-21). Defendant Hammond also testified at her deposition that on several occasions, she received complaints about Plaintiff from some of Plaintiff's co-workers. (Hammond Dep. pp. 11, 32). Plaintiff even testified at her own deposition that she had a naturally aggressive work ethic, that she was assertive, and that it was possible that she had shortcomings in getting along with people. (Pl. Dep. pp. 123-24, 162, 190-93). Defendant McCalla Raymer has provided evidence that numerous clients and co-workers complained about Plaintiff's demanding, rude, and threatening behavior, which form the basis of criticism in Plaintiff's evaluation and written reprimand. Plaintiff's conclusory allegations of discrimination without more, are insufficient to raise an inference of pretext or intentional discrimination where an employer has offered extensive evidence of legitimate, non-discriminatory reasons for its actions *See Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir. 1996). Accordingly, Defendants' Motion for Summary Judgment on Plaintiff's retaliation claim should be **GRANTED**.

E. Plaintiff's Claim for Intentional Infliction of Emotional Distress

Plaintiff claims the Defendants intentionally inflicted emotional distress upon her because Defendants made negative statements regarding Plaintiff's future with the firm, fabricated co-workers' and clients' complaints about Plaintiff, failed to promote her, and conspired with Plaintiff's physicians to force her back to work so that she could be terminated. Defendants contend that Plaintiff cannot establish a claim for intentional infliction of emotional distress because Defendants' conduct was not extreme or outrageous and in any event, Plaintiff cannot show severe emotional distress because Plaintiff did not seek any treatment.

To state a claim for intentional infliction of emotional distress under Georgia law, the plaintiff must show (1) that the conduct was intentional or reckless; (2) that the conduct was extreme and outrageous; (3) that there is a causal connection between the conduct and the emotional distress; and (4) plaintiff's resulting emotional distress was severe. *McClung Surveying, Inc. v. Worl*, 541 S.E.2d 703, 707 (Ga. Ct. App. 2000) (citation omitted). The level of "outrageousness and egregiousness [required] to sustain a claim for intentional infliction of emotional distress is a question of law." *Kramer v. Kroger Co., Inc.*, 534 S.E.2d 446, 451 (Ga. Ct. App. 2000) (citing *Yarbray v. Southern Bell Tel. & Tel. Co.*, 409 S.E.2d 835, 838 (Ga. 1991). A claim for intentional infliction of emotional distress requires more than an allegation that plaintiff was offended or insulted. *Kornegay v. Mundy*, 379 S.E.2d 14, 16 (Ga. Ct. App. 1989). Plaintiff's burden in establishing the requisite extreme and outrageous conduct and to sustain a claim for intentional infliction of emotional distress is

stringent. *Ingram v. JIK Realty Co.*, 404 S.E.2d 802, 804 (Ga. Ct. App. 1991), *cert. denied.* Plaintiff must show that the alleged conduct has been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Northside Hosp., Inc. v. Ruotanen*, 541 S.E.2d 66, 69 (Ga. Ct. App. 2000) (citation omitted). "Although the existence of a special relationship in which one person has control over another, such as the employer-employee relationship, may contribute to the outrageousness of the situation, it is not dispositive." *Miraliakbari v. Pennicooke*, 561 S.E.2d 483, 487 (Ga. Ct. App. 2002) (citing *Troncalli v. Jones*, 514 S.E.2d 478, 482 (Ga. Ct. App. 1999). Specifically in the employment context, the Georgia Court of Appeals stated that

> [T]he liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of . . . filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt.

Miraliakbari, 561 S.E.2d at 487-88.

Applying the law to the facts of this case, Plaintiff is unable to sustain a claim for intentional infliction of emotional distress Aside from her conclusory allegations in the Complaint and the submission of a forged document, Plaintiff has presented no evidence to substantiate her

allegations that Defendants fabricated client complaints against her and conspired with her doctors to get her to return to work in order to terminate her. Plaintiff's reprimand stating that she was "pushy, threatening, and rude," are at best, mere insults or indignities and as a matter of law, do not rise to the level of extremeness or outrageousness required to sustain a claim for intentional infliction of emotional distress. *See Fox v. Ravinia Club*, 414 S.E.2d 243 (Ga. Ct. App. 1991) (holding that defendant's conduct in speaking to the plaintiff in a hostile, intimidating, and abusive manner; giving false reasons for plaintiff's termination, and laughing at and taunting the plaintiff was insufficient to state a claim for intentional infliction of emotional distress). Moreover, Plaintiff has not sought any treatment for her allegedly severe emotional distress. (*See* Pl. Dep. pp. 316-20). Even if Defendants' conduct could be construed as extreme and outrageous, Plaintiff cannot show that her resulting emotional distress and humiliation was sufficiently severe for Defendants to be liable.

F. Plaintiff's Defamation Claims (Libel and Slander)

Plaintiff contends that her supervisors, Defendants Alper and Hammond, knowingly and intentionally relayed false information about Plaintiff, orally and in writing, to members in the firm, human resources personnel, a client, and outside sources, specifically with respect to the written reprimand Plaintiff received on May 16, 2000, which discussed a client's complaint about Plaintiff's unprofessional conduct. (*See* DMSJ, Ex. 7). Defendants contend that Plaintiff cannot make out a case for defamation because the alleged defamatory statements were not false

or malicious, the statements were not published and were privileged.

In order to prove defamation, a plaintiff must show that (1) the alleged defamatory language was false and malicious; (2) the defamatory language was unprivileged and published to a third party; (3) fault by the defendant; and (4) the defamatory statements damaged the plaintiff's reputation. *See Mathis v. Cannon*, 573 S.E.2d 376, 380 (Ga. 2002) (citing RESTATEMENT (SECOND) OF TORTS § 588 (1977)). Libel and slander are subsets of the broader tort of defamation; libel is written defamation and slander is oral defamation. *Nida v. Echols*, 31 F. Supp 2d. 1358, 1374 n.33 (N.D. Ga. 1998) (citing *Williamson v. Lucas*, 320 S.E.2d 800 (Ga. 1984)). Under Georgia law, libel is a "false and malicious defamation of another . . . tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule." GA. CODE. ANN. § 51-5-1. Slander, on the other hand, includes, among other things, "[m]aking charges against another in reference to his trade, office or profession, calculated to injure him therein." GA. CODE. ANN. § 51-5-4(a)(3). Liability exists only for communications that are false, and truth is therefore a defense to both libel and slander. *See* GA. CODE. ANN. § 51-5-6; *Speedway Grading Corp. v. Gardner*, 425 S.E.2d 676, 678 (Ga. Ct. App. 1992) (citing *Williams v. Trust Co.*, 230 S.E.2d 45, 50 (Ga. Ct. App. 1976)). The plaintiff has the burden of proving the falsity of the statements. *Jaillett v. Ga. Television Co.*, 520 S.E.2d 721, 724 (Ga. Ct. App. 1999), *cert. denied* (citations omitted). Although malice may be implied by the character of the charge, it may be rebutted, and in cases involving privileged communications, such evidence bars recovery. *See* GA. CODE. ANN. § 51-5-5.

Georgia law provides, in pertinent part, that statements are privileged when they are "made in good faith in the performance of a public duty . . . made in good faith in the performance of a legal or moral private duty . . . or made with a good faith intent on the part of the speaker to protect his or her interest in a matter in which it is concerned." GA. CODE. ANN. § 51-5-7. To invoke privilege, the defendant must show good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication. *Sparks v. Parks*, 324 S.E.2d 784, 787 (Ga. Ct. App. 1984) (citing *Sheftall v. Cent. Of Ga. Ry. Co.*, 51 S.E. 646, 648 (Ga. 1905)).

Statements made to investigating agencies such as the EEOC or the Worker's Compensation Board are privileged. *See, e.g., Bertotti v. Philbeck, Inc.*, 827 F. Supp. 1005, 1013 (S.D. Ga.1993) (citing *Lamb v. Fedderwitz*, 22 S.E.2d 657 (Ga. Ct. App. 1942), *aff'd*, 25 S.E.2d 414 (Ga. 1943) (statements made about plaintiff to EEOC in the investigation of plaintiff's discrimination claims, a quasi-judicial proceeding, were privileged); *Ass'n Servs. v. Smith*, 549 S.E.2d 454, 462 (Ga. Ct. App. 2001) (report and videotape prepared in connection with plaintiff's worker's compensation claim were privileged). Similarly, a former employer's response to inquiries from prospective employers raises a conditional privilege based on the performance of a moral private duty. *Bertotti*, 827 F. Supp. at 1013 (citing GA. CODE. ANN. § 51-5-7(2) (1982); *Kenney v. Gilmore*, 393 S.E.2d 472, 473 (Ga. Ct. App. 1990) ("Georgia courts have long recognized that a prima facie privilege shields statements made concerning a current or former employee by a current or former employer to one, such as a prospective employer, who has a legitimate interest in such information."). This specific employer privilege has

been separately codified into the Georgia Code *See* GA. CODE. ANN. § 31-1-4.

Additionally, an intra-corporate communication, that is, a statement made by one corporate agent to another corporate agent, cannot form the basis of a defamation action because such communication is the equivalent of "speaking to one's self" and is therefore not considered "published." *Nida*, 31 F. Supp 2d. at 1374-75 (citing *Elder v. Cardoso*, 421 S.E.2d 753 (Ga. Ct. App. 1992); *Kurtz v. Williams*, 371 S.E.2d 878 (Ga. Ct. App. 1988); *Walter v. Davidson*, 104 S.E.2d 113 (Ga. 1958)). Furthermore, when there has been no publication, there can be no defamation, and "[w]hether the communication was made maliciously and with knowledge of its falsity is immaterial." *Terrell v. Holmes*, 487 S.E.2d 6, 8 (Ga. Ct. App. 1997). "Publication of allegedly defamatory information in the course of an [intra-corporate] investigation of an employee's job performance, when made to persons in authority, is not 'publication' within the meaning of the law." *ITT Rayonier, Inc. v. McLaney*, 420 S.E.2d 610, 612 (Ga. Ct. App. 1992) (citations omitted) (holding that statements made in one-on-one conversations and in meetings with supervisory personnel or a personnel department representative are intra-corporate communications and, as a matter of law, do not constitute publication).

Applying the law to the facts of this case, Plaintiff cannot establish any claim for defamation: she has not established the falsity of any statements Defendants made regarding her work performance, she cannot establish that any such statements were published because they were intra-corporate communications or privileged under

Georgia law, and she cannot show that her reputation was damaged.[10] Plaintiff, with no citation to legal authority, asserts that "without a doubt," she has produced evidence of the falsity of Defendants' statements. Plaintiff also relies on the forged Swanson letter and a letter purportedly written by Defendant McCalla Raymer's insurance carrier, on which Plaintiff appears to have written personal notes about the insurance company and Plaintiff's worker's compensation doctors having knowledge of Plaintiff's EEOC charge. (*See* Pl. Resp. to DMSJ, Ex. 18). Even construing this evidence as credible, it does not prove the falsity of Defendants statements concerning Plaintiff's work performance. Moreover, Plaintiff has not responded to Defendants' argument about the statements being privileged or non-publishable under the intra-corporate communication doctrine. Accordingly, Plaintiff has failed to demonstrate that Defendants published an allegedly libelous or slanderous statement in a manner that may give rise to liability under Georgia law. Accordingly, Defendants' Motion for Summary Judgment on Plaintiff's defamation claims for libel and slander should be **GRANTED**.

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[10] When Plaintiff was asked at her deposition to name people to whom defamatory statements were published, Plaintiff could not name anyone. Moreover, when Plaintiff was asked about the last names of people she identified in her complaint, she could not elaborate on who those alleged prospective employers were. (*See* Pl. Dep. pp. 322-26).

G. Plaintiff's Claims of Fraud and Statutory Conspiracy

1. Fraud and Actual Fraud

Plaintiff alleges that Defendants perpetrated a scheme of fabrications against Plaintiff designed to cause her damages. Defendants argue that Plaintiff cannot establish fraud because Defendants' did not fabricate complaints against Plaintiff, nor did Plaintiff detrimentally rely on any alleged fabrications.

To establish fraud under Georgia law, the plaintiff must prove the following five elements: (1) a false representation; (2) scienter; (3) intent to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damages. *Kodadek v. Lieberman*, 545 S.E.2d 25, 28 (Ga. Ct. App. 2001) (citation omitted); *Marriott Corp. v. Am. Acad. of Psychotherapists, Inc.*, 277 S.E.2d 785, 787 (Ga. Ct. App. 1981). "Actual fraud consists of any kind of artifice by which another is deceived. Constructive fraud consists of any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another." *Kodadek*, 545 S.E.2d at 28 (quoting GA. STAT. ANN. § 23-2-51(b)).

Plaintiff has presented no evidence that Defendant knowingly or recklessly fabricated complaints against her. To the contrary, the evidence in the record shows that Defendant McCalla Raymer believed and actually observed and experienced Plaintiff's rude and demanding behavior with fellow employees, clients and customers. Moreover, Plaintiff discussed at her deposition some problems getting along with coworkers. (*See, e.g.*, Pl. Dep. pp. 123-34). Likewise, Plaintiff has presented no evidence

of Defendants' intent to induce Plaintiff to act or refrain from acting in a certain way, justifiable reliance by Plaintiff, or any damages suffered. Accordingly, Plaintiff's fraud claim fails as a matter of law.

2. Statutory Conspiracy

Plaintiff alleges that Defendants conspired with Plaintiff's doctors to force her back to work prematurely while she was recovering from an injury so that they could terminate her employment. Defendant contends that there is no civil statutory conspiracy under Georgia law and nevertheless, Plaintiff's claim would fail as a matter of law because a corporation cannot conspire with itself. Plaintiff, relying on the forged Swanson letter and without any legal support, argues that "the conspiracy herein has led to the Acts of Fraud and even if no code section in the Official Code of Georgia exist [sic], conduct of this nature is actionable under the theory that it furthers the act of Fraud."

Plaintiff cannot establish a claim for conspiracy because there is no cognizable conspiracy action in Georgia, and further, because there is no underlying action for fraud. "It is well settled that a plaintiff cannot maintain an action for a conspiracy in the absence of underlying actionable conduct." *Ass'n. Servs., Inc. v. Smith*, 549 S.E.2d 454, 460 (Ga. Ct. App. 2001). Accordingly, Defendants' Motion for Summary Judgment should [sic] **GRANTED** as to Plaintiff's conspiracy claim.

H. Plaintiff's Claim for Breach of a Fiduciary Duty

Plaintiff alleges that Defendants breached a fiduciary duty owed to her because her employer failed to protect her from unreasonable harm, malicious behavior, and risk. Defendants contends [sic] that this claim fails as a matter of law because Plaintiff cannot establish that she enjoyed a confidential relationship with Defendants.

Under Georgia law, a confidential relationship exists "where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." GA. CODE. ANN. § 23-2-58. Although the employee-employer relationship does not automatically imply the existence of a confidential relationship, "the facts of a particular case may establish the existence of a confidential relationship between an employer and an employee concerning a particular transaction, thereby placing upon the parties the fiduciary obligations associated with a principal-agent relationship." *Atlanta Mkt. Ctr. Mgmt., Co. v. McLane*, 503 S.E.2d 278, 281-82 (Ga. 1998). The party claiming breach of a fiduciary duty has the burden of proving the existence of a confidential relationship. *Parello v. Maio*, 494 S.E.2d 331, 333 (Ga. 1998).

Plaintiff has presented no evidence in support of this claim and therefore it fails as a matter of law. Accordingly, Defendants' Motion for Summary Judgment should be **GRANTED** as to Plaintiff's breach of fiduciary duty claim.

III. CONCLUSIONS

For the foregoing reasons, Plaintiff's Motion to Strike Defendants' Motion for Summary Judgment is **DENIED**. Docket Entry [37]. Defendants' Motions to Strike Plaintiff's Undisputed Statement of Facts and Plaintiff's Response to Defendants' Statement of Undisputed Facts are **GRANTED**. Docket Entries [50-1, 50-2]. Plaintiff's affidavit and Exhibit 12 of Plaintiff's Response to Defendants' Motion for Summary Judgement are hereby **STRICKEN**. Plaintiff is **ORDERED** to pay the Defendants' reasonable expenses, including attorney's fees and the expense of the handwriting expert, resulting from having to investigate the forgery, from May 22, 2002 until the date Defendants concluded their investigation. Plaintiff is also **ORDERED** to pay Defendants' reasonable expenses and attorney's fees incurred in bringing the motion for the hearing, and pursuant to Rule 56(g), the reasonable expenses incurred as a result of the filing of Plaintiff's affidavit. Defendants' are therefore **DIRECTED** to submit to the Court a listing of the above-stated expenses and attorney's fees within eleven (11) days of this order. Finally, **IT IS RECOMMENDED** that Defendants' Motion for Summary Judgment be **GRANTED** and the case be **DISMISSED WITH PREJUDICE**. Docket Entry [30].

SO ORDERED AND REPORTED AND RECOMMENDED, this 29th day of JANUARY, 2003.

/s/ Linda T. Walker
LINDA T. WALKER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS, Plaintiff, vs McCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, LLC, PENNI A. ALPER and CHRISSA HAMMOND, Defendants.	CIVIL CASE NO.: 1:01-CV-1414-MHS
QUEEN STARKS, Plaintiff, vs McCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, LLC, Defendants.	CIVIL CASE NO.: 1:01-CV-1749-MHS

ORDER

(Filed Dec. 13, 2002)

A hearing pursuant to Defendants' request for hearing on Rule 56(g) and for potential violations of Rule 11(b) regarding Plaintiff's submission of affidavit and document 12 in support of Plaintiff's response to motion for summary judgment is **set** for **Thursday, January 9, 2003 at 10:00 a.m.** before the undersigned magistrate judge in Courtroom 5, 16th Floor, United States Courthouse, 75 Spring Street, Atlanta, Georgia.

SO ORDERED, this 11th day of December, 2002.

/s/ Linda T. Walker
LINDA T. WALKER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

QUEEN STARKS, Plaintiff, v. McCALLA, RAYMER, PADRICK, COBB, NICHOLS & CLARK, LLC, Defendant.	:	CIVIL ACTION FILE NO. 1:01-CV-1749-MHS

MAGISTRATE JUDGE'S SHOW CAUSE ORDER

(Filed Apr. 23, 2002)

On March 5, 2002, this Court issued an Order directing the parties to file separate Certificates of Interested Persons within twenty (20) days of the date of the Order. Docket Entry [20]. The docket sheet does not reflect that a certificate has been filed by the parties.

IT IS HEREBY ORDERED that the parties show cause in writing within ten (10) days from the date of this Order, why this case should not be dismissed for the parties' failure to file a Certificate of Interested Persons as previously directed in this Court's order of March 5, 2002. If the parties fail to respond to this court's Order within ten (10) days from the date of the Order, this case may be dismissed. The Clerk is **DIRECTED** to resubmit this case to the undersigned Magistrate Judge within fifteen (15) days of the date of this Order if the parties have failed to comply with this Order.

IT IS SO ORDERED this 23rd day of APRIL, 2002.

/s/ Linda T. Walker
LINDA T. WALKER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15428-CC

QUEEN STARKS,

Plaintiff-Appellant,

LEVI BREEDLOVE,

Movant-Appellant,

versus

MCCALLA, RAYMER, PADRICK, COBB, NICHOLS, & CLARK, LLC, CHRISSA HAMMOND, in official capacity and personally, PENNI A. ALPER, in official capacity and personally,

Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING
AND PETITION(S) FOR REHEARING EN BANC

(Filed Jul. 12, 2005)

Before: BLACK, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested

that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] Black
UNITED STATES
CIRCUIT JUDGE

RULE 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signatures. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the

sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of the rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.